

No. 10690

United States
Circuit Court of Appeals
For the Ninth Circuit.

CLINTON B. McELHENY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

APR 25 1944

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

Attorney for Appellant:

CHAS. L. GILMORE, Esq.

Capital National Bank Bldg.
Sacramento, California.

Attorneys for Appellee:

FRANK J. HENNESSY, Esq.

United States Attorney

EMMETT J. SEAWELL, Esq.

Assistant U. S. Attorney
Sacramento, Calif.

In the Northern Division of the United States
District Court for the Northern District of
California

INDICTMENT

First Count: (T. 18 USCA, 82)

In the October 1943 term of said Division of
said District Court, the Grand Jurors thereof, on
their oaths present: That

CLINTON B. McELHENY

hereinafter called said defendant, heretofore, to-
wit, on or about the 1st day of January, 1942, at
the Sacramento Air Depot, McClellan Field, in the
County of Sacramento, within the Northern Divi-
sion of the Northern District of California, and
within the jurisdiction of this Court then and there
being, did feloniously, knowingly, wilfully and un-
lawfully take and carry away for his own use, with
intent then and there had by said defendant to
steal and purloin the same, personal property of
the United States, said personal property being
more particularly described as follows:

CLASS 17-B

	Approximate Value
1 Clamp "C" light service, 1 1/4" .....	.10
3 Countersink steel, S.S. 5/8" body, 1/4" shank, 80° incl, angle	2.28
2 Countersink steel, S. S. 5/8" body, 1/2" shank 82° ditto....	1.52
1 Countersink steel, S. S. 3/4" body, 1/2" shank, 54° ditto....	.78
1 Countersink steel, S. S. 3/4" body, 1/2" shank, 60° ditto....	.88
1 Countersink steel, S. S. 3/4" body, 1/2" shank, 78° ditto....	1.40
1 Die & collet 10 - 32, 2" O.D.....	1.00
1 Die & collet 1/4 - 28, 2" O.D.....	1.20

		Approximate Value
1 Die & collet $\frac{3}{8}$ - 16, 2" O.D.....		1.35
1 Die & collet $\frac{5}{16}$ - 24, 2" O.D.....		1.20
1 Die & collet $\frac{1}{2}$ " 20, 2 - $\frac{3}{4}$ " O.D.....		1.75
1 Die & collet $\frac{5}{8}$ - 11, 2 - $\frac{3}{4}$ " O.D.....		1.95
1 Die & collet $\frac{3}{4}$ - 16, 2 - $\frac{3}{4}$ " O.D.....		2.20
1 Die & collet $\frac{1}{2}$ - 13, 2 - $\frac{3}{4}$ " O.D.....		1.75
1 Drill, twist straight shank No. 5, H.S.....		.24
1 Drill, twist straight shank, Letter A"H.S.....		.25
8 Drill, twist straight shank, No. 1D H.S.....		1.68
2 Drill, ditto 14 .....		.40
2 Drill, ditto 22 .....		.34
4 Drill, ditto 24 .....		.64
1 Drill, ditto 8 .....		.22
		[1*]
3 Drill, ditto 15 .....		.60
4 Drill, ditto 16 .....		.76
1 Drill, ditto 29 .....		.14
2 Drill, ditto 20 .....		.34
1 Drill, ditto 23 .....		.16
3 Drill, ditto 28 .....		.42
3 Drill, ditto 21 .....		.51
2 Drill, ditto 26 .....		.32
1 Drill, ditto 25 .....		.16
1 Drill, ditto 22 .....		.17
4 Drill, ditto 30 .....		.56
2 Drill, ditto 33 .....		.26
2 Drill, ditto 27 .....		.32
3 Drill, ditto 38 .....		.36
1 Drill, ditto 13/64 H.S. ....		.21
1 Drill, ditto 5/32 .....		.17
1 Drill, ditto 9/16"		1.33
1 Drill, ditto 33/64" .....		.90
1 Drill, ditto 17/64"		3.50
1 Drill, ditto 7 .....		.22
3 Drill, ditto 18 .....		.57
1 Drill, ditto Letter C.....		.26
1 Drill, ditto E.....		.27
5 Drill, ditto 15/64 H.S.		1.15

*Page numbering appearing at foot of page of original certified Transcript of Record.

		Approximate Value
6 Drill, ditto	7/32	1.38
1 Drill, ditto	19/64" .....	.36
2 Drill, ditto	No. 1 .....	.52
4 Drill, ditto	4	1.00
3 Drill, twist, straight shank No. 6 H.S.....		.72
2 Drill, ditto	3 .....	.52
2 Drill, ditto	9 .....	.44
1 Drill, ditto	3/16 .....	.19
2 Drill, ditto	No. 12 .....	.42
3 Drill, ditto	13 .....	.60
2 Drill, ditto	2 .....	.52
1 Brush, steel wire, 1½" dia. Osborn 68.....		.56
1 Drill, twist, straight shank No. 34 HS.....		.12
1 Drill, ditto	35 .....	.11
4 Drill, ditto	40 .....	.40
1 Drill, ditto	31 .....	.12
3 Drill, ditto	39 .....	.33
1 Drill, ditto	41 .....	.11
1 Drill, ditto	37 .....	.11
1 Drill, ditto	49 .....	.09
1 Drill, ditto	44 .....	.09
1 Drill, ditto	½" H.S. ....	.97
2 Drill, ditto	9/32" .....	.66
5 Drill, ditto	19/64"	1.80
2 Drill, ditto	No. 12 .....	.38
8 Drill, ditto	10.....	1.52
5 Drill, ditto	28.....	.65
4 Drill, ditto	53.....	.36
9 Drill, ditto	46.....	.81
1 Drill, ditto	11.....	.19
1 Drill, ditto	extension ⅛" H.S. ....	.14
1 Drill, ditto	ditto 5/32" .....	.17
2 Drill, ditto	ditto 3/16" .....	.38
2 Drill, star, ½ .....		.22
1 Drill, star, ¾ .....		.19
1 Drill & countersink	3/10 x 3/10 x 1/8.....	.30
1 Drill, ditto	7/16 x 3/16 x 3/16".....	.45
		[2]
1 Extractor, screw ezy-out, #1.....		.15
2 Extractor, ditto	#2.....	.34
3 Extractor, ditto	#3.....	.54

	Approximate Value
2 Extractor, ditto #4.....	.48
2 Extractor, ditto #5.....	.56
1 Extractor, ditto #6.....	.28
1 File, flat, smooth, 8" .....	.20
1 File, square, smooth, 6" .....	.12
2 File, ditto 10".....	.25
1 File, vixon, flat 10" .....	.93
1 File, flat, smooth, 12" .....	.36
1 File, flat, bastard, 12" .....	.15
1 File, half round, smooth, 10" .....	.33
1 File, ditto .....	.14
1 File, warding, bastard, 8" .....	.14
1 File, flat bastard, 6" .....	.13
1 Knife, bastard, 12" .....	.32
1 File, half round bastard, 6" .....	.18
2 File, round bastard, 6" .....	.20
1 File, round bastard, 8" .....	.12
2 File, round smooth, 6" .....	.20
1 File, square, bastard, 8" .....	.12
1 File, three square, smooth, 6" .....	.15
2 File, Swiss pattern, square .....	.36
3 File, ditto oval .....	.57
3 File, ditto flat .....	.57
3 File, ditto half round .....	.57
1 set Figures, stamping gothic 1/16" O-9	4.50
1 Handle, socket wrench, hinge 3/8" sz. dr. ....	.92
1 Head, center, 12" combination set .....	.75
1 Head, protractor, 12" combination set	2.52
1 Blade, combination square .....	.60
1 Chisel, diamond point, 1/4" cutting edge .....	.19
1 Joint, socket wrench, universal, 3/8" sq. dr.	
1 male & female .....	.51
1 set Letters, stamping gothic 1/16" A-Z.....	1.50
4 Handle, file, wood, medium .....	.20
1 File, rotary, round pointed	1.50
1 File, ditto	1.50
1 Extractor, screw, ezy-out #3 .....	.17
2 Punch, drift pin, 1/16".....	.60
1 Punch, ditto 3/32" .....	.18
3 Punch, ditto 1/4" .....	.90
3 Punch, ditto 5/32" .....	.63

	Approximate Value
1 Punch, ditto 1/8" .....	.18
5 Punch, ditto 7/32"	1.20
4 Punch, center 5/16"	1.00
6 Tap, hand, taper 6-36	4.98
2 Punch, center spacing (Starrett)	1.40
1 Tap, hand, taper 4-40 .....	.83
3 Tap, ditto 6-40	2.49
7 Tap, ditto 6-32	5.81
5 Tap, ditto 8-32	4.15
3 Tap, ditto 8-36	2.49
14 Tap, ditto 10-32	12.04
9 Tap, ditto 10-24	7.74
1 Tap, ditto 1/4-28 .....	.72
1 Tap, hand, plug 7/16-20	1.35
2 Tap, hand, pipe, taper 1/8-27 .....	.28
1 Tap, hand taper 5/16-18 .....	.71
1 Tap, hand, plug, 7/16-14 .....	.86
1 Tap, hand, taper 5/16"-18 .....	.71
	[3]
1 Tap, hand, plug 1/2-20	1.16
1 Pump, Lehman Bros., size 26 #15229	
1 Torch, welding smith #2 complete with tips	20.44
2 Wheel, buffing, tampico, 8" .....	.86
1 Wheel, abrasive, straight 8 x 3/4 x 1/2	1.51
1 Tool, flaring comb., 3/16" 1/16 - 5/8"	2.25
1 Shears, metal cutting compound leverage, right cut, 1 1/4"	2.13
2 Scriber, machinists double point, 9" .....	.66
1 Saw, circular, metal slitting, 1 1/2" dia. 3/32" thick, 1/2" hole	2.24
1 Saw, circular, ditto 2 3/4 dia. 1/16" thick 1" hole	1.98
1 Saw, ditto 5/16" thick 1" hole	1.15
1 Saw, ditto 1/32" thick 1" hole	1.15
1 Wrench, adj. jaw, single end, 8" .....	.61
1 Wrench, ditto 10" .....	.77
1 Wrench, adj. auto, 10" .....	.80
1 Wrench, OE., D.H. 5° angle 5/16" x 13/32" M.O. ....	.14
2 Pliers, diagonal cutting, 6" .....	.88
1 Tape, measuring, steel 50 ft.	3.56
1 Shears, metal cutting, compound leverage 1 1/4" cut approx., left cut	2.13

	Approximate Value
2 Saw, circular, metal slitting, 3" dia. 1/32" thick 1" hole HS	3.96
1 Saw, circular, ditto 2 3/4" dia. .040 thick x 1" hole.....	1.15
3 Saw, circular, ditto, 3" dia. 3 3/32 thick 1" hole HS....	6.12
3 Saw, circular, ditto 3" dia. 1/8" thick 1" hole HS.....	8.40
2 Reamer, taper pin #3/o	3.24
1 Reamer, ditto #2/o.....	1.62
4 Reamer, ditto #0	6.44
1 Reamer, ditto #1	1.80
5 Reamer, ditto #2	9.90
6 Reamer, ditto #3	12.96
3 Reamer, ditto #4	7.56
1 Reamer, ditto #5	2.70
3 Reamer, hand 3/16" HS	4.68
1 Reamer, hand 13/64" HS	2.12
1 Reamer, hand 15/64" HS	2.12
1 Socket, 12 point, 3/8" sq. dr. 5/16" BO .....	.13
1 Socket, ditto 7/16".....	.13
1 Socket, ditto 1/2".....	.13
1 Socket, ditto 3/4".....	.15
1 Socket, universal, 12 point, 3/8" sq. dr. 1/2" BO.....	.50
1 Socket, ditto 3/4" BO55

CLASS 03-K

1 Gage, oxygen, AD-2215	2.15
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CLASS 05-C

1 Gage, altitude type B-10	15.80
----------------------------------	-------

CLASS 08

1 Cord, extension, 2 plug	1.50
	[4]

CLASS 29

1 Wrap lock .....	.60
1 Padlock Master #6	6.60
1 Padlock Huro .....	.70
1 Padlock Olco .....	.80

of the total approximate value of\$279.20

said defendant then and there well knowing that said personal property was then and there the property of the United States of America.

Second Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, certain personal property of the United States, said property being more particularly described under Class 17-B in the first count of this indictment (reference to which description is hereby made and the same by reference incorporated herein with the same force and effect as though fully set forth), said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Third Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his posses-

sion with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as One Gage, oxygen, Ad-2215, Class 03-K, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America. [5]

Fourth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Gage, altitude type B-10 Class 05-C, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Fifth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern

District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Cord, extension, 2 plug Class 08, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Sixth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, [6] knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Wrap lock, one Padlock Master #6, one Padlock Huro, and one Padlock Oleo Class 29, said defendant then and there well knowing that said personal property had theretofore

been stolen from and was then and there the property of the United States of America.

FRANK J. HENNESSY

United States Attorney

By EMMETT J. SEAWELL

Assistant United States Attorney

[Endorsed]: A True Bill. John W. Geeslin,
Foreman Grand Jury.

[Endorsed]: Filed Jan 7 1944. C. W. Calbreath,
Clerk. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 12th day of January, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

UNITED STATES

vs.

CLINTON B. McELHENY

PLEA OF NOT GUILTY

This case came on this day ex-parte. The defendant was present in Court in custody of the U. S.

Marshal, having been produced by the U. S. Marshal upon a bench warrant hertofore issued, and with Charles L. Gilmore, Esq., his Attorney; and, on motion of Thomas O'Hara, Assistant U. S. Attorney, was called for arraignment. The defendant was informed of the return of the Indictment and asked if he was the person named therein; and, upon his answer that he was, and that his true name was as charged, thereupon waived the reading of the Indictment. The defendant was called to plead, and thereupon plead Not Guilty to the Indictment, which said plea was Ordered entered. The defendant and attorneys for both parties, in Open Court, orally waived trial by Jury. Ordered this case be continued to January 18, 1944, to be set for trial. [8]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 16th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

TRIAL

This case came on regularly this day for trial before the Court sitting without a jury, a trial by

jury having been heretofore orally waived in Open Court by the defendant and the attorneys. The defendant Clinton B. McElheny was present in Court with Charles L. Gilmore, Esq., his Attorney. Emmet J. Seawell, Assistant U. S. Attorney, was present for and on behalf of the United States. Arthur E. Chandler, Warren M. Parker, Max V. Hobbs and Walter E. Moehle were sworn and testified for and on behalf of the United States. Mr. Seawell introduced in evidence and filed U. S. Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, and introduced for identification U. S. Exhibit No. 1, and the United States rested. Clinton B. McElheny was sworn and testified for and on behalf of the defendant. Mr. Gilmore introduced in evidence and filed defendant's Exhibits Nos. A, B and C. Ordered that the further trial hereof be continued until February 17, 1944, at 10 o'clock a.m. [9]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 17th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

FURTHER TRIAL

The attorneys hereto and the defendant herein being present as heretofore, the further trial hereof was thereupon resumed. Clinton B. McElheny was recalled and Thomas E. Dudley was sworn and testified for and on behalf of the defendant. Mr. Gilmore introduced in evidence and filed defendant's Exhibits Nos. D, E, F, G, H, I and J, and introduced for identification defendant's Exhibit No. K, and the defendant rested. Arthur E. Chandler was recalled and testified for and on behalf of the United States, and the United States rested. Thereupon the evidence was closed. After argument by Mr. Gilmore to the Court, it is Ordered that this case be and the same is hereby continued until February 18, 1944, at 1:30 o'clock p.m. [10]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 18th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

FURTHER TRIAL

The attorneys and the defendant being present as heretofore, the further trial of this case was thereupon resumed. After argument by Mr. Seawell, the case was submitted to the Court for consideration and decision, and the same being fully considered, it is Ordered that the defendant be and he is hereby adjudged Guilty on the First Count of the Indictment. On motion of Mr. Gilmore, and with the consent of Mr. Seawell, it is Ordered that Counts 2, 3, 4, 5, and 6 be and they are hereby dismissed. Mr. Gilmore made a motion for a new trial, which said motion was Ordered denied. The defendant was called for judgment, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court Ordered And Adjudged that the defendant, having been found Guilty of said offenses, is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for the period of One (1) Year in a County Jail, and that judgment be entered herein accordingly. It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer and that the same shall serve as the commitment herein. It is further Ordered that the bond heretofore given herein for the appearance of the defendant herein, be and the same is hereby exonerated and sureties thereon discharged. [11]

District Court of the United States, Northern
District of California—Northern Division

UNITED STATES

vs.

CLINTON B. McELHENY

No. 8637—Criminal Indictment in Six counts for violation of U. S. C., Title 18 Secs. 82, 101 (Theft and possession of Government property)

JUDGMENT AND COMMITMENT

On this 18th day of February, 1944, came the United States Attorney, and the defendant Clinton B. McElheny appearing in proper person, and by counsel, and

The defendant having been adjudged guilty by the Court of the offenses charged in the 1st Count of the Indictment in the above-entitled cause, to-wit:

On or about the 1st day of January, 1942, at the Sacramento Air Depot, McClellan Field, California, defendant did feloniously and unlawfully take and carry away for his own use, personal property of the United States, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) year

It Is Further Ordered that Counts 2, 3, 4, 5 and 6 of the Indictment, be and the same are hereby dismissed.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

EMMET J. SEAWELL

Assistant U. S. Attorney

(Signed) MARTIN I. WELSH

United States District Judge.

The Court recommends commitment to County Jail.

[Endorsed]: Entered and filed this 18th day of February, 1944. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Clinton B. McElheny, Route 1, Box 574, Fair Oaks, California.

Name and address of appellant's attorney: Chas. L. Gilmore, 303 Capital National Bank Bldg., Sacramento, (14), California.

Offense: Taking and carrying away with intent to steal personal property of the United States (18 U.S.C.A. Sec. 82).

Date of Judgment: February 18, 1944.

Brief description of judgment or sentence: Guilty of first count of indictment; not guilty of 2nd, 3rd, 4th, 5th and 6th counts and the same were dismissed; sentenced to One (1) year in County Jail on first count.

Name of prison where now confined: Temporarily in County Jail at Sacramento. Motion to admit to bail pending appeal denied by trial court.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

Dated: February 21, 1944.

CLINTON B. McELHENY
Appellant.

GROUND'S OF APPEAL

1. That the Court erred in law by which the substantial rights of defendant were affected, and

which prevented defendant from having a fair trial, in this:

(a) In accepting and allowing in evidence, purported confessions of defendant in violation of defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution; [13]

(b) In refusing to allow or permit defendant to show the laws, rules and regulations of the United States Army governing McClellan Field, under which defendant was employed;

(c) In refusing to allow or permit defendant to present written evidence termed "memorandum receipts" and "passes", to establish that all tools set forth and described in said indictment came lawfully into his possession and for which he was required to account or pay for under the rules and regulations promulgated by the United States Army;

(d) In refusing to allow or permit defendant to present written receipts issued by the Army Command of McClellan Field showing payment to have been made for a large part of the items set forth in said indictment, which canceled memorandum receipts evidencing deductions from pay for other items named, and money receipts showing payment for the remainder, all having been delivered and paid in accordance with the rules and regulations of the United States Army;

(e) In refusing to allow or permit defendant to prove that tools and equipment are allowed and permitted by the United States Army in command

at McClellan Field to be taken from said field by civilian employees;

(f) In refusing to give consideration to the doctrine of reasonable doubt in determining the guilt of defendant;

(g) In refusing to consider or recognize the Articles of War and in particular Article 2 and Section 80 thereof;

(h) In presuming from the mere fact of possession that the articles named in the indictment were stolen by defendant, while adjudging defendant not guilty of possession.

(i) In presuming from the mere fact of possession that defendant took said articles and each of them with intent to steal and purloin the same

CHAS. L. GILMORE

Attorney for Defendant

Due service by copy of the within Notice of Motion admitted this 21st day of February, 1944.

FRANK J. HENNESSY

EMMET J. SEAWELL

Attorneys for Plaintiff

[Endorsed]: Filed Feb 21 1944. [14]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now comes the defendant, Clinton B. McElheny, by his Attorney, and says that in the proceeding

herein, and in the orders and judgment entered, there are manifest errors, to-wit:

ASSIGNMENT OF ERROR No. 1

The Court erred in admitting Government's Exhibit No. 2, (10-inch steel wrench):

The testimony of Witness Parker was substantially that wrenches similar to that are bought by contract from Wright Field which is the main depot for buying Army property and tools of this type, but not all tools, are marked "U. S. A." and this wrench is. (Bill of Exceptions, p. 11)

The reasons such Exhibit should not have been admitted are as follows:

1. It was hearsay testimony, and no proper identification of the Wrench that it had ever been at McClellan Field, was had by the witness.

2. It was admitted on the ground of similarity, alone.

ASSIGNMENT OF ERROR No. 2

The Court erred in admitting Government's Exhibit No. 3, (Padlock): [15]

The testimony of witness Parker was substantially that it has a number on it similar to the ones put on at McClellan Field, which they used a long time ago. I used to identify the padlocks at McClellan Field that way a long time ago. They don't use that type of padlock any more. (Bill of Exceptions P. 11.)

The reasons such exhibit should not have been admitted are as follows:

1. It was hearsay testimony and no proper identification was had.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 3

The Court erred in admitting Government's Exhibit No. 4, (Machinist's scriber):

The testimony of witness Parker was substantially that he identified it by the marks "U.S.A." and that is the way these articles are marked at McClellan Field. (Bill of Exceptions P. 11).

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification of the wrench that it had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

The Court erred in admitting U. S. Exhibit No. 5 (pliers.):

The testimony of witness Parker was substantially that he identified the pliers by the mark "U. S." on them and that all of that type they had in stock at McClellan Field are marked with "U. S." on them. (Bill of Exceptions, P. 11).

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification of the pliers that they had ever been at McClellan Field was had by the witness.

2. They were admitted on the ground of similarity alone. [16]

ASSIGNMENT OF ERROR No. 5

The Court erred in admitting U. E. Exhibit No. 6 (Steel Tape):

The testimony of witness Parker was substantially that he identified the tape as having "Air Corps, U. S. Army" on it and that is the way this type of tape is marked at McClellan Field. (Bill of Exceptions, p. 12).

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the tape had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 6.

The Court erred in admitting U. S. Exhibit No. 7 (Wrench):

The testimony of witness Parker was substantially that he identified the wrench as coming from McClellan Field for the reason it bore the marking "U. S. A." (Bill of Exceptions p. 12).

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the wrench had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 7.

The Court erred in admitting U. S. Exhibit No. 8 (Pliers):

The testimony of witness Parker was substantially that he identified these pliers by the marking "U. S." on them and that there were similar pliers at McClellan Field. (Bill of Exceptions p. 12.)

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the pliers had ever been at McCellan Field was had by the witness.

2. They were admitted on the ground of similarity alone. [17]

ASSIGNMENT OF ERROR No. 8.

The Court erred in admitting U. S. Exhibit No. 9 (Miscellaneous lot of tools). (Bill of Exceptions, p. 12).

The testimony of witness Parker was substantially that he could identify the tools then in a paper bag as they were all marked "U. S. A.", and similar tools were at McClellan Field.

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the tools had ever been at McClellan Field was had by the witness.

2. They were admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 9.

The Court erred in admitting U. S. Exhibit No. 10 (Statement of defendant taken by Lieutenant Ark—Bill of Exceptions, p. 15).

This statement is as follows:

“24 November 1943,
McClellan Field, California.

“I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths, without any threats, coercion or promises of any immunity, do hereby swear and affirm that the statement I am about to make is a true statement.

The only articles of government property I have or had in my possession off the reservation or had any knowledge of having were the articles that Mr. Arthur E. Chandler recovered from my home on November 23, 1943, with the exception of the following listed articles which I disposed of on the 21st of November, 1943:

“A. Three Oxygen Pressure Gauges.

“B. One dozen old files. [18]

“C. One and one-half of two pounds of bolts and nuts.

“D. One electrical plug.

“E. About one-half dozen pieces of 2 inch or 3 inch copper tubing.

“F. About one-half dozen copper tubing $\frac{1}{4}$ inch fittings.

"G. Three pronged electrical plug.

"H. One set of steel stencils.

"The only other exceptions to those listed above are those articles which were given to me on a pass to be taken from McClellan Field for my own personal use, and they are described as follows:

"1. Several hundred boiler tubes.

"2. Approximately 2500 feet of lumber.

"3. Approximately 300 feet of 3 by 3 by $\frac{1}{8}$ formed angle steel.

"4. One boiler base.

"5. Two five gallon cans.

"6. Two alcohol barrels.

"7. Several lengths of flexible conduit.

"There are three pages to this statement."

Signed: "Clinton B. McElheny.

"Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A. C., Summary Court Officer."

The testimony in support of the statement was given by witness Sergeant Hubbs, substantially, that preliminary to the taking of this statement, defendant had been before the summary court, interviewed at length, had then gone to his home voluntarily, with witness Chandler, who previously testified such visit was made about 10 o'clock in the evening of November 23, and not on the 24th, and on the 24th some time after 10 o'clock P.M., defendant made the statement before Lieutenant Ark, Sergeant Hubbs, witness Chandler, and another investigator named Cecchettini. The statement shows on its face that defendant was advised the meeting

was a [19] summary court and that the defendant, as a civilian employee of the Field, was subject to its processes.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was hearsay evidence, did not contain all the evidence and statements obtained and made during the session of the summary court and was an extrajudicial confession obtained by trick and ruse, and without any foundation having been laid for its introduction.

2. Its nature was highly prejudicial to the defendant.

ASSIGNMENT OF ERROR No. 10.

The Court erred in admitting U. S. Exhibit No. 11, statement of defendant to F.B.I. agent Moehle, as follows: (Bill of Exceptions, p. 18.)

“Sacramento, California,
November 29, 1943.

“I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; and no threats or promises have been made to me. I know it may be used in court.

“I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division.

On or about December 15, 1941, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

“50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

“Most of these items were in various boxes at Sacramento Air [20] Depot and were materials charged out to me.

“I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating the federal law in so doing.

“I have read the above statement and say it is true.”

Signed: “Clinton B. McElheny.”

“Witnesses by: Walter E. Moehle, Special Agent, F. B. I., Sacramento, Calif., 11/29/43; Robert E. Coeke, Special Agent F. B. I., Sacramento, Calif., 11/29/43.”

The testimony in support of the statement given by witness Moehle, is, in substance, as follows:

That witness invited defendant to come to his office in the postoffice building in Sacramento, which he did on November 29, 1943, and at that time defendant was not under arrest and was not put under arrest by witness. The list of tools attached to the statement was handed to witness by someone else. The tools were not in the office of witness at that time. (List is omitted from state-

ment as it is identical with list contained in first count of indictment). Witness did not state he advised defendant statement would be used against him in court or at all, nor that he was under no compulsion to make any statement.

The reasons such exhibit should not have been admitted are as follows:

1. That it was and is incompetent to prove any of the issues of this case.
2. That is was and is hearsay.
3. That it is in form an extrajudicial statement for which no foundation had been laid.
4. That it was highly prejudicial to defendant.

ASSIGNMENT OF ERROR No. 11.

The Court erred in admitting U. S. Exhibit No. 12, box of tools. (Bill of Exceptions, p. 21.) [21]

The testimony offered in support of the exhibit was stated by counsel for the plaintiff, to wit:

That the box contained tools claimed to have been found at defendant's home; that they were similar to tools used at McClellan Field; that they are the tools described in U. S. Exhibits Nos. 10 and 11. (Bill of Exceptions, p. 15 and 18.)

The reasons why such exhibit should not have been admitted are as follows:

1. There was no identification of any of the tools as having ever been at McClellan Field nor as ever been owned by or in the possession of the United States.
2. That the tools were admitted in evidence on

the ground they were similar to tools in use at McClellan Field, and therefore incompetent.

3. That no evidence independent of the extrajudicial confessions of defendant admitted over objection was introduced connecting the defendant with any of the tools in such exhibit.

4. That the court indulged in a presumption of guilt of defendant as the basis for introduction of said exhibit.

ASSIGNMENT OF ERROR No. 12.

The Court erred in sustaining objection on the grounds of incompetence, immateriality and irrelevancy, to testimony of defendant in attempting to show the method and means provided by the Field to return tools upon transfer to another position on the Field.

The testimony on this point was substantially as follows:

That tools were issued to workmen, foremen and superintendents on memorandums by the Tool Room, and on "Form 81" from the Supply Division. If on memorandums, the employee was charged with them and if not accounted for, the value was deducted from his pay. If on Form 81 they were expendable and non-recoverable and these included the drills up to and including $\frac{1}{4}$ inch and small reamers. [22] This meant the foremen and superintendents obtained three or four dozen at a time and passed them out to the workmen as needed. If the foreman was transferred he had to account for tools on the memorandums and if any

were on hand issued on Form 81, he had to take care of them until he could turn them back in. That defendant was made Assistant Superintendent of Air Craft Shops and thereafter his work day averaged fourteen hours a day, and he had to work all three shifts. He had no place safe from theft to keep any tools he formerly had in his possession and had to take them home which he did in this case. That he had succeeded in clearing up his memorandums to a great extent with the exception of the small items charged against him in the indictment.

That he was asked by his counsel what means were provided at the Field for turning in tools charged against him. (Bill of Exceptions, p. 29.)

Whereupon counsel objected on the ground that the evidence was incompetent, irrelevant and immaterial and sustained by the court.

The reasons why such evidence and testimony should have been admitted were as follows:

1. Witness had already progressed along the line of showing the system established by the Army at the Field for issuing and accounting for tools, and he was entitled to complete the showing as establishing cause for alleged delay in getting these small items from his home to the Field.

2. That such showing was part of his defense in showing affirmatively, there was no intent on his part to violate any law.

3. That such evidence was competent to show his innocence of crime, although the burden was not upon him.

4. That it was relevant to the cause in which he was being tried.

5. That it was material as showing the absence of criminal intent and absence of guilt. [23]

ASSIGNMENT OF ERRORS No. 13.

The Court erred in sustaining objection to introduction in evidence of demand of McClellan Field against defendant in the sum of \$61.24 to cover value of lost tools, which defendant received through the mails. (Bill of Exceptions, p. 33.)

The reasons why such evidence should have been admitted are:

1. That it was competent evidence to show the system at the Field under which employees were issued tools and if not returned, they paid for them.

2. That it was material in showing that the tools came lawfully into his possession.

3. That it was relevant to the issues as showing no intent of defendant to steal any tools.

4. That it was part of the system under which defendant worked and tended to show defendant merely followed the system with no thought of violating any law of the United States.

ASSIGNMENT OF ERROR No. 14.

The Court erred in sustaining objections to introduction in evidence of the following memorandum receipts issued by McClellan Field to defendant and listing tools contained in the indictment:

3 pages, dated Sept. 27, 1939; No. 42-293, dated Jan. 7, 1942; No. 42-3529, dated August 20, 1942;

No. 42-32912, dated June 2, 1942; No. 43-9620, dated Nov. 12, 1942; No. 42-32352, dated June 5, 1942; No. 43-18347, dated May 7, 1943; No. 44-15, dated Nov. 23, 1943; No. 44-3909, dated Nov. 29, 1943; No. 44-69, dated July 1, 1943; No. 43-6431, dated Sept. 26, 1943; No. 43-6564, dated Sept. 26, 1942. (Bill of Exceptions, pp. 33-35.)

The reasons why such memorandums should have been issued are:

1. They showed that all tools named in the indictment, other than those classified as expendable and non-recoverable and other than those owned by defendant, were regularly issued to defendant under the system used at McClellan Field, for which he was charged [24] and which he had paid for.

2. They were competent evidence to prove defendant was not guilty of stealing any of the tools.

3. They were material to his defense.

4. They were relevant to the issue of guilt or innocence of defendant.

ASSIGNMENT OF ERROR No. 15.

The Court erred in sustaining objection to admission of receipt No. E-N-3753, voucher 1-12-44 issued by the Field to defendant either in December, 1943, or January, 1944, showing payment of the sum of \$52.92 for tools. (Bill of Exceptions, p. 35.)

The testimony of defendant regarding the voucher was substantially that before he could get his final check he had to pay for the tools listed

thereon and he made the payment either in December, 1943, or January, 1944. (Bill of Exceptions, p. 35.)

The reasons why the voucher should have been admitted are:

1. That it was part of the system in use at the Field.

2. That it was competent to show the innocence of defendant of either intent to steal or felonious possession of tools.

3. That it was relevant to the issue of guilt or innocence.

4. That it was material to the defense of both theft and possession.

ASSIGNMENT OF ERROR No. 16.

The Court erred in sustaining objection to testimony of defendant as to conversation had with Captain Pearce the day following the date of the alleged confession set forth under Assignment of Error No. 9, *supra*. (Bill of Exceptions, p. 38.)

The testimony of defendant was substantially that after the statement was obtained on November 24, 1943, Captain Pearce was brought in who stated he was the summary court martial officer, representing the Commanding Officer and who said he wished to take testimony. He asked defendant if defendant had a bank account, if [25] defendant knew the Government should not buy from a vendor, said defendant bought materials from vendors, which defendant stated he denied as his

only responsibility was recommending material be purchased. (Bill of Exceptions, p. 38.)

The reasons this testimony and evidence should have been admitted are:

1. It showed the extent of the grilling defendant received in the effort to obtain the so-called confession.

2. It established the fact that this defendant believed and was warranted in his belief that he was on November 25, 1943, still under court martial since its convening on the day previous.

3. It showed the so-called confession was obtained pursuant to third-degree methods.

4. It was competent to show the whole course of the investigation to which this defendant was subjected.

5. It was relevant and material to show the whole of this third-degree proceeding which plaintiff had opened up in its case in chief.

ASSIGNMENT OF ERROR No. 17.

The Court erred in striking out the testimony of plaintiff regarding being in custody of Mr. Chandler.

The defendant testified substantially that he was taken to the "Ark court-martial" by Chandler, that he was in the Chandler's custody all the time, that Chandler practically lived with him during that time. (Bill of Exceptions, p. 39.)

The reasons why this evidence should have been admitted are:

1. It showed that at least the defendant was under surveillance if not under actual arrest as part of court-martial proceedings.

2. It further supported the claim the whole of the alleged court-martial was simply to force a confession. [26]

ASSIGNMENT OF ERROR No. 18.

The Court erred in sustaining objection to introduction in evidence of defendant's exhibit K for identification: Pass for tools, as follows: (Bill of Exceptions, p. 45.)

“SASCMD5-5

8 October 1943.

“To Whom It May Concern:

1. Mr. T. E. Dudley is to be permitted to carry the following to and from his work at this Depot.

1 Set Drawing Instruments.

1 Machinery Hand Book.

1 Triangle.

1 12" ruler, 1 steel rule.

2. He is also permitted to carry partly finished drawings of tools to and from the field. This pass will terminate 1 December 1943.

For: R. G. JAMES,

Captain, Air Corps,

Engine Repair Officer.”

Witness Dudley testified substantially that he was assistant to the supervisor of tools and methods; that they designed tools, rebuilt tools, made fixtures, built buildings, tore them down and moved ma-

chinery; that he had contact with the tool room and supply department; that tools were issued to him for use in his work. (Bill of Exceptions, p. 16.) He was not permitted to go further. (See Assignment of Error No. 19, next following.)

The reasons why this evidence should have been admitted are:

1. It was competent to show the system in use at the field under which employees were permitted to take tools from the Field.

2. It was relevant to the defense of defendant as showing tools could be off the Field and yet lawfully in possession of that individual. [27]

3. It was material to the defense of defendant as showing that persons other than defendant were permitted to take tools from the Field to the homes.

ASSIGNMENT OF ERROR No. 19.

The Court erred in sustaining objection to the testimony of witness Dudley regarding expendable tools, on the sole ground that defendant had already testified on the same point. (Bill of Exceptions, p. 46.)

The testimony of witness Dudley on this point was substantially that expendable tools were tools consisting of a great many items that supervisors or foremen or leaders can draw, which were put out on the line or to mechanics and not charged to anybody; that when they are worn out they are thrown away; that everybody, army officers, laboratories use them; that when they are used that

way no one is called upon to account for them or to return them. (Bill of Exceptions, p. 46.)

The reasons why such evidence should have been admitted are:

1. That it was competent in corroboration of defendant's testimony that small tools, such as defendant was charged with stealing and having unlawfully in his possession were, upon being issued to an employee, classed as expendable and marked off the records at the Field.

2. It was relevant to the defense as showing the impossibility of defendant ever being able to return these small tools to the Field, as there was no record of their existence once they were issued to the employee.

3. It was material as showing absence of reasonable doubt of the guilt of defendant as to any felonious intent of defendant in taking the tools in the first instance.

ASSIGNMENT OF ERROR No. 20.

The Court erred in refusing the offer of counsel for defendant to prove by witness Dudley that all the small drills, as one [28] item of the indictment, were all expendable. (Bill of Exceptions, p. 46.)

The reasons why such evidence should have been admitted are:

1. It was competent to show, as one link of the chain of defense of defendant, that all small drills which defendant was charged in the indictment as having stolen and as having unlawfully in his pos-

session, were of such character that defendant could not return them to the Field.

2. It was relevant to the defense of defendant, as showing no one had nor could identify any of them as coming from or as ever having been on the Field.

3. It was material to the defense of defendant for the above reasons.

ASSIGNMENT OF ERROR No. 21.

The Court erred in sustaining objection of counsel for plaintiff on the grounds of incompetency and irrelevancy to question asked witness Dudley as follows: (Bill of Exceptions, p. 46.)

“Q. Do you know of your own knowledge whether tools from the Field could be taken home by workmen by authority of the officers in charge of the Field and used at home?”

The reasons why such evidence should have been admitted are:

1. It was competent as showing tools in the possession of an employee off the Field were not prima facie evidence of theft or unlawful possession and, in fact, no evidence against defendant at all.

2. It was relevant to the defense for the same reason.

ASSIGNMENT OF ERROR No. 22.

The Court erred in sustaining objection of counsel for plaintiff on the grounds it was incompetent, immaterial and irrelevant and no bearing on the case to question asked witness Dudley as follows: (Bill of Exceptions p. 46.) [29]

“Q. Do you know whether the tool room at McClellan Field finally posted notices to the effect that tools borrowed for home use were to be returned?”

The reasons why such evidence should have been admitted are:

1. It was competent as showing that the taking of tools from the Field for home use by workmen was commonplace.

2. It was material to the defense as rebutting a charge of theft based upon possession of tools off the Field.

3. It was relevant to the issues of theft and unlawful possession as showing total absence of criminal intent of defendant to commit any crime.

ASSIGNMENT OF ERROR No. 23.

The Court erred in sustaining objection of counsel for plaintiff on grounds it was incompetent, irrelevant and immaterial and no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows: (Bill of Exceptions p. 47.)

“Q. Do you know whether tools and equipment on the Field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them?”

The reasons why such evidence should have been admitted are:

1. It was competent to establish that the command at the Field discarded tools and it was common practice for employees to salvage them and

take them home with the knowledge and consent of the Field command; that such proof would rebut the claim of criminal intent charged against defendant.

ASSIGNMENT OF ERROR No. 24.

The Court erred in sustaining objection of counsel for plaintiff on grounds it was incompetent, irrelevant and immaterial, no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows: (Bill of Exceptions, p. 47.)

“Q. Do you know of your own knowledge whether an employee prior to August, 1943, could obtain a pass from the authorities to [30] take any of that material or tools from the junk pile or fire pit and take it off the Field?”

The reasons why such evidence should have been admitted are:

1. It was competent to establish that the command at the Field, after tools were discarded and junked, issued passes to employees to take such tools from the Field to their homes and that such was the common practice.

2. It was material to the defense as showing that mere possession of tools off the Field could not be considered as evidence either of theft or unlawful possession.

ASSIGNMENT OF ERROR No. 25.

The Court erred in rejecting the offer of proof on behalf of defendant made to show that a foreman issuing tools to workmen would find himself

with two of the same kind for the reason one workman would turn in the bit of a drill, receive a new one, another would turn in the shank and receive one, and when the workmen were shifted and turned in their drills, the foreman would have two drills instead of the one he had been issued, with no provision whereby he could turn in the odd drill to the Field; and further, that upon change of type of tools or equipment at the Field results in all former tools being thrown on the junk pile, sold to dealers in Sacramento and elsewhere or ordered thrown into the fire pit and burned. (Bill of Exceptions, p. 48.)

The reasons why such offer of proof should have been allowed are:

1. It was competent to show that tools from the Field found in the possession of any person off the Field, are not evidence either of theft or of unlawful possession.

2. It was relevant and material to the defense as showing absense of any criminal intent when tools were found in possession of this defendant.

[31]

ASSIGNMENT OF ERROR No. 26.

The Court erred in finding defendant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts.

The error of the Court was briefly as follows:

1. The only evidence that could *possible* connect the defendant with any crime was the fact he had tools in his possession.

2. To omit all evidence of possession from the case would leave nothing whereon to base a charge of theft.

3. To convict of theft alone necessitates indulging in a presumption of guilt, a presumption of intent, a presumption against reasonable doubt, resulting in a conviction founded solely upon presumptions based upon presumptions.

ASSIGNMENT OF ERROR No. 27.

The Court erred in refusing defendant a new trial on the grounds set forth in the written motion filed.

Wherefore defendant, Clinton B. McElheny, prays that by reason of the foregoing errors, the judgment entered in the trial Court adjudging him guilty of theft as set forth in the first count of the indictment in this cause be reversed.

Dated: March 8, 1944.

CHAS. L. GILMORE,

Attorney for defendant and
appellant.

[Endorsed]: Filed March 8, 1944. [32]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that heretofore the Grand Jury of the United States in and for the Northern District of California, Northern Division, did find and return to and before the above entitled Court on January 7, 1944, its indictment against the defendant, Clinton B. McElheny, which indictment was and is as follows, to-wit:

[Printer's Note: Indictment is not reproduced here, as it is set out in full at pages 2 to 11 of this printed record.] [1*]

That thereafter and on the 12th day of January, 1944, the defendant, upon being arraigned in person, entered a plea of Not Guilty as to all Counts of said indictment and did in open [7] Court orally waive trial by jury.

Thereafter, on the 17th day of February, 1944, the above cause came on for trial before the Honorable Martin I Welsh, one of the Judges of said Court, sitting without a jury, Emmett J. Seawell, Assistant United States Attorney, appearing as counsel for the United States and Chas. L. Gilmore, appearing as counsel for the defendant.

Whereupon the United States offered and introduced the following evidence and exhibits of evidence, and the following evidence was received or rejected, and objections and motions were made and rulings of the Court were entered, all as follows, to-wit:

*Page numbering appearing at foot of page of original Bill of Exceptions.

ARTHUR CHANDLER,

called as a witness on behalf of plaintiff, having been duly sworn, testified as follows:

My occupation is Investigator for the Air Service Command, Headquarter at McClellan Field. Have been employed approximately one year and am now so employed.

I am acquainted with Clinton B. McElheny who is sitting there with his attorney, Mr. Gilmore.

I had a conversation with Mr. McElheny both at the Intelligence Office and at his residence during November or some time around and about that time in regard to Government property.

I first met Mr. McElheny at the Intelligence Office, November 23, 1943, at which meeting were present Captain Ark, Sergeant Hubbs, Andrew Cecchettini and myself. The defendant said he had taken and had home Government property that belonged to the United States Government and that he would be willing to take an investigator to his home for that purpose of making an investigation to determine what he had that belonged to the United States Government, what he had taken home, and turn over to this investigator at that time all property that was found to be property of the United States Government. After this conversation at approximately 10:00 o'clock P.M. in the evening of November 23, 1943, I [8] went to Mr. McElheny's house with him. He asked me in and we went direct to Mr. McElheny's son's bedroom which he stated contained a tool box of tools. We went

(Testimony of Arthur Chandler.)

into his son's bedroom and Mr. McElheny pointed out this box of tools sitting right on the floor. So he was very careful to identify his personal tools from Government Tools, to remove all Government tools from that box and said that he knew they were Government property and he turned them over to myself and I returned those tools to the Intelligence Officer at McClellan Field. I have seen the majority of those tools in that box which you have just shown me in the residence of Mr. McElheny and several other items were recovered from a barn to the rear of his house and several other items were recovered from a house trailer in the back of the house. Mr. McElheny took me to the barn saying he wanted to be sure there was or was not any Government property in the barn and if so found to turn it over to me to take to McClellan Field. I found some of these items. After we went into the barn we went into the house trailer as Mr. McElheny suggested we would look in the house trailer to see if there was additional Government property there. It was his house trailer and I found in these the extension cord and several pliers. Mr. McElheny admitted that he got them from McClellan Field.

Cross Examination by Counsel for Defendant.

The tools that are in that large envelope bear the United States Government marks and identification and the ones that are in the carton are not marked with the specifications of the United States Government. There is a way of identifying or es-

(Testimony of Arthur Chandler.)

tablishing the fact that those came from McClellan Field other than the statement of Mr. McElheny, as we have the stock tracer from the tool issue who is in charge of all tools and he can explain better than I can the identification of those particular tools.

(Bit or drill exhibited to witness.) That is a standard drill and those taps are standard. [9]

“Q. Isn’t it a fact most any of these, such as reamers can be purchased anywhere”? Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial and outside the direct examination, which objection was sustained by the Court.

WARREN WILFORD PARK

called as a witness on behalf of plaintiff, having been duly sworn, testified as follows:

I am now and for the five years last past have been Supervisor in charge of tool issue at McClellan Field. I am familiar with tools that are issued of that field. The book you have in your hand is a stock list listing small hand tools, published by authority of the Commanding General, Army Air Forces, Headquarters Air Service Command, Patterson Field, Fairfield, Ohio. The witness was asked if it was a stock list issued by the Commanding General and counsel for defendant objected on the ground that it called for an opinion and conclusion of the witness.

(Testimony of Warren Wilford Park.)

The Court then examined the witness on his voir dire and the witness testified in response to questions of the Court as follows:

I have charge of the book. It came from the tool issue, McClellan Field, issued to me in connection with my duties. It came from the Supply Division for the purpose of establishing, keeping our records and getting the correct names of tools. We do not keep the records in this book. We just get the correct names of tools and prices and stock numbers. I am quite familiar with the book.

Whereupon the Court ruled as follows:

“You may use it in regard to the items which will be presented to you, if it is necessary. Use it to identify the articles that are presented to you, as to what they are and where they came from”.

The witness proceeded in his direct examination. The marking on the 10 inch steel wrench just handed to me has the marking on it that is put on the wrenches at McClellan Field, “U. S. Army”. That is the way tools bought under federal specifications are [10] marked at McClellan Field which question was objected to by counsel for defendant as calling for the opinion and conclusion of the witness. No ruling by the Court.

I know how this wrench was bought. They are bought by contract from Wright Field, wrenches similar to that. Wright Field is the main depot for buying government or army property. Not all tools are marked “U.S.A.”. Tools of this type are. That particular wrench is.

(Wrench offered as Government Exhibit No. 2

(Testimony of Warren Wilford Park.)

which was objected to by counsel for defendant on the ground it had not been properly identified, which objection was overruled.) Admitted as Government's Exhibit No. 2.

The padlock just handed to me has a number on it similar to the ones put on at McClellan Field and this number is "155". They did use this to mark the padlocks at one time, a long time ago. They used that way to identify the padlocks at McClellan Field; not all of them, but not now. They don't use that any more. They used it on this type of padlock.

(Padlock offered as Government's Exhibit No. 3 and admitted over the objection by counsel for defendant that it was purely hearsay.)

The item you have in your hand now is a machinist's scriber, double point, nine inches long. It has the same marking as the wrench, "U. S. Army". I identify it by the marks "U.S.A." and that is the way these articles are marked at McClellan Field.

(Machinist's scriber admitted in evidence as Government's Exhibit No. 4, over the objection of counsel for defendant that the same was purely hearsay.)

I can identify the pair of pliers now shown me by the mark "U.S.". All of that type we have in stock are so marked.

(Pliers offered and received in evidence as Government's Exhibit No. 5 over objection of counsel for defendant that the same was hearsay.) [11]

(Testimony of Warren Wilford Park.)

The steel tape you have in your hand is marked "Air Corps, U. S. Army" and that is the way this type of tape is marked at McClellan Field.

(Steel tape offered and received in evidence as Government's Exhibit No. 6 over objection of counsel for defendant that it was hearsay.)

I identify the 8 inch steel wrench shown me by the marking, "U. S. A." which is put on all wrenches of that type at McClellan Field and by that identify this wrench as coming from McClellan Field.

(Wrench offered and received in evidence as Government's Exhibit No. 7 over the objection of counsel for defendant that the same was hearsay.)

The pliers you now show me I identify by the marking "U.S." on it, which letters indicate "United States" to me. We have similar pliers at McClellan Field marked that way.

(Pliers offered and received in evidence as Government's Exhibit No. 8 over objection of counsel for the defendant that the same was hearsay.)

It was then stipulated between counsel that a lot of tools in a paper bag might be exhibited to the witness at one time.

I saw all those tools in that paper bag this morning and I can identify each of them by the mark "U. S. A.", which indicates to me that they are United States Government property and we have similar tools so marked at McClellan Air Field.

(The lot of tools and paper sack were offered and admitted in evidence as government's Exhibit No.

(Testimony of Warren Wilford Park.)

9 over the objection of the counsel for defendant that the same was hearsay.)

I saw all those articles in that box including the electric cord and other articles this morning in your "United States Attorney's office. We have similar articles to those at McClellan Field. They are all listed in the stock list. That is, just the tools. I never saw these particular tools until this morning and [12] never saw them on the field. I checked against my stock list and found all the tools in this box are of a similar type we have at McClellan Field. I never saw anything like that pump out at McClellan Field. With that one exception, all the rest of them are similar to articles out at McClellan Field.

All the exhibits in the box were then offered as Government's Exhibit next in order, to which counsel for defendant objected on the ground it was hearsay, highly irrelevant and on the further ground it called for an opinion and conclusion of the witness and an endeavor to convict on approximation or similarity, to which objection the Court reserved its ruling.

Thereupon the witness further testified on cross examination as follows:

U. S. Exhibit No. 7 is just a standard 8 inch Crescent wrench and I believe similar to those that are used in other places besides the air field. The United States may have tools of similar character in other places than McClellan Field and might be marked "U. S. A." if they are a government organi-

(Testimony of Warren Wilford Park.)

zation. I never went to a second-hand store where they sell Government property and never saw any similar things purchased by private citizens. All I have testified to is that these wrenches are similar to ones on the Field and that is as far as my testimony goes. That holds true to all of the things in the same category including the tape which is a standard steel tape, the two pairs of pliers and the padlock.

MAX V. HUBBS

called as a witness for plaintiff, being duly sworn, testified as follows:

I am a Sergeant at McClellan Field, California, assigned to the Intelligence section of the Sacramento Air Forces, United States Army, and was so employed on November 24, 1943. I know Clinton B. McElheny and he is sitting there in the courtroom. I saw Mr. McElheny on or about November 24, 1943, in the office of [13] the Intelligence Officer at which were present Captain Ark, Mr. Cecchettini, Mr. Chandler and myself. I was present when the defendant gave a statement as to certain Government tools and Government property that he had at his home. I was asked by Captain Ark to write this statement in longhand while it was being given. I recognize the writing on this piece of paper as my handwriting and aside from the heading it was written as expressed by Mr. McElheny. After I had

(Testimony of Max V. Hubbs.)

written it, Mr. McElheny read it, signed it, "Clinton B. McElheny". He identified all pages with his signature.

The statement was then offered in evidence, at which point counsel for defendant asked the Court for the opportunity of reading it as he had never seen it before. Counsel requested the Court for permission to ask the witness a few questions, which was granted.

Cross Examination

Mr. McElheny returned from his home with Mr. Chandler with the property that is exhibited and at that time Captain Ark, who was then Lieutenant Ark, was present, I was present and I believe Mr. Chandler was still there and they discussed this property that was involved after the property was brought from Mr. McElheny's home to the Field. Mr. McElheny was before this group prior to going to his home and he returned with Mr. Chandler with the property to the same group of people. As preliminary to this statement there had been another hearing or interview between the group officers. He was notified to come into the office at his convenience but I do not know who invited him. He arrived after I was there. As to the statement, "I, Clinton B. McElheny having been duly warned of my rights under the 24th Article of War", that means from a military standpoint and affecting those people who come within the Articles of War, there is a provision wherein a person is advised of his rights. The 24th Article of [14] War pertains

(Testimony of Max V. Hubbs.)

to those rights as respects making a statement and the officer taking the statement as explained further in that paragraph, is a representative of the Court,—any military Court, inasmuch as he is a summary court officer especially appointed for that purpose.

The statement further says, “knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths” and Captain Ark is appointed as a summary court officer. He is an intelligence officer and an intelligence officer in some cases is appointed as a summary court officer and as such under the military rules he represents the military court in the taking of a statement.

Mr. McElheny at that time was advised of the foregoing fact at that time. He wasn't before a court or tribunal. He was before the Intelligence officer who was the representative of a military court for the purpose of taking the statement. Captain Ark is an intelligence officer and I am not prepared to explain the details as to when that authority begins or ends as to the full responsibility. He is a commissioned officer and I am a non-com.

The statement referred to was offered and received in evidence as U. S. Exhibit No. 10, over the objection of counsel for defendant that no proper foundation had been laid for its admission; that it constituted extrajudicial confession with no foundation made therefor and on the further ground it was pure hearsay. The statement is in words and figures as follows:

(Testimony of Max V. Hubbs.)

“24 November 1943, McClellan Field, California.

I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the [15] processes of a military court or tribunal duly authorized to take oaths, without any threats, coercion or promises of any immunity, do hereby swear and affirm that the statement I am about to make is a true statement.

“The only articles of government property I have or had in my possession off the reservation or had any knowledge of having were the articles that Mr. Arthur E. Chandler recovered from my home on November 23, 1943, with the exception of the following listed articles which I disposed of on the 21st of November 1943:

“A. Three Oxygen Pressure Gauges.

“B. One dozen old files.

C. One and one-half of two pounds of bolts and nuts.

“D. One electrical plug.

“E. About one-half dozen pieces of 2 inch or 3 inch copper tubing.

“F. About one-half dozen copper tubing $\frac{1}{4}$ inch fittings.

“G. Three pronged electrical plug.

“H. One set of steel stencils.

“The only other exceptions to those listed above are those articles which were given to me on a pass to be taken from McClellan Field for my own personal use, and they are described as follows:

(Testimony of Max V. Hubbs.)

"1. Several hundred boiler tubes.

"2. Approximately 2500 feet of lumber.

"3. Approximately 300 feet of 3 by 3 by $\frac{1}{8}$ formed angle steel.

"4. One boiler base.

"5. Two five gallon cans.

"6. Two alcohol barrels.

"7. Several lengths of flexible conduit.

"There are three pages to this statement."

Signed: "Clinton B. McElheny. [16]

"Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A. C., Summary Court Officer."

Whereupon counsel for defendant moved to strike out all of the items in the statement not contained in the indictment, which motion was denied by the Court.

Cross Examination

I was present during the discussions and took the statement. The first discussion involved at considerable length a general problem on the basis of which Mr. McElheny was very conversant. The first interview continued for about two hours and the second one was from half hour to an hour. There was a great deal more said between the parties and said by Mr. McElheny than is contained in the statement. That is all that occurred as respects the property involved. There were other discussions that took place concerning problems at McClellan Field at the first meeting. Lieutenant Ark at the second meeting, asked quite a few questions of Mr. McElheny and so did others. I couldn't actually say

(Testimony of Max V. Hubbs.)

whether he made responses to them all. I was present but all those questions and answers are not in the statement.

Redirect Examination

All that was stated in regard to Government's Exhibits 2 to 9 inclusive in regard to these tools is contained in the statement.

Recross Examination

This statement contains references to articles which have been introduced in evidence as plaintiff's Exhibits 1 to 9; also to property that he disposed of and property that he took out on pass.

WALTER E. MOEHLE,

called as a witness for plaintiff, being duly sworn, testified as follows:

I am now and have been for approximately three years a Special Agent, Federal Bureau of Investigation. I am acquainted with Clinton B. McElheny who is sitting at the counsel table. I saw him first at McClellan Field on or about November 29, 1943, and had a [17] conversation with him in regard to the facts of the case as told to me by Captain Ark of the Intelligence Office at McClellan Field. Mr. McElheny was also on the Field at that time and I made an appointment with Mr. McElheny to come to my office here in the Post Office Building. He came to my office on the afternoon of November 29, 1943, at which time there was also present Special Agent Goeke. At that time I reduced to writing what Mr.

(Testimony of Walter E. Moehle.)

McElheny told me. The writing you have shown me is in my handwriting and is the statement that was signed by Mr. McElheny in my presence. He signed the first and the second page. The typewritten pages represent the list of articles that Mr. McElheny stated were recovered from his home and those articles so listed were Government property. He stated at that time the list was correct.

Examination on Voir Dire

On November 29, 1943, at the time this statement was taken, Mr. McElheny was not under arrest. I met him at the Field that day. I do not know when the typewritten list was prepared, but it was handed to me by someone else. I don't remember the exact date. I checked the articles attached here as List No. 1 and reviewed them thoroughly. They were not in my office at the time I interviewed Mr. McElheny. None of the articles in that list were in my possession in my office at the time I questioned Mr. McElheny.

Statement offered as U. S. Exhibit No. 11, to which counsel for defendant objected on the ground it was incompetent; that it was hearsay and that it was in the form of an extrajudicial statement for which no foundation had been laid, which objection was overruled and the document admitted, which reads as follows:

"Sacramento, California, November 29, 1943.

"I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special

agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; [18] and no threats or promises have been made to me. I know it may be used in court.

"I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division. On or about December 15, 1921, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

"50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

"Most of these items were in various boxes at Sacramento Air Depot and were materials charged out to me.

"I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating a federal law in so doing.

"I have read the above statement and say it is true."

Signed: "Clinton B. McElheny."

"Witnesses by: Walter E. Moehle, Special Agent, F. B. I., Sacramento, Calif., 11/29/43; Robert E. Goeke, Special Agent F. B. I., Sacramento, Calif., 11/29/43."

Whereupon counsel for the plaintiff offered in evidence a box of tools which had theretofore been marked U. S. Exhibit No. 1 for identification.

To this offer counsel for defendant objected on the ground that there had been no identification of the items in the box. There was no evidence to connect this defendant with either the taking of the tools, or the abstraction of the tools in any way, shape, form or manner; that the only thing that might possibly connect the defendant with them is the fact of similarity; that [19] there was no rule of law under which an individual could be convicted of the crime of theft or by possession simply because of the fact he has in his possession something that is similar to that which another person has; that the United States comes into Court as an individual, bound by the same rules of law and procedure as the lease of its citizens and with no greater rights or privileges; that if there should be a conviction upon similarity it must arise through a presumption of guilt by the Court and not a presumption of innocence; that the mere fact that one has in his possession a thing which is similar in all respects to some item which may be or may not be found in some government bureau, agency or operation is not of and in itself a sufficient showing to convict one of a crime.

Whereupon counsel for the plaintiff said, "I will concede that. There is no argument as to that."

Whereupon counsel for defendant further argued, without the rule of similarity, then the alleged confession itself could not be admitted in evidence; that

there has not been any identification of a single thing in that box and it is insufficient to show that things of a similar character have been abstracted.

To which counsel for the Government stated, "I have conceded that, Counsel. There is no use arguing that."

Counsel for defendant further argued that if the only point that the prosecution has to depend on is the mere matter of similarity, then in that event there was nothing before the Court sufficient to authorize or allow the introduction of anything that was in the box; that witnesses have testified that they are common, ordinarily accepted things, used by anyone and all that we have as a basis for their introduction is an extrajudicial confession taken from an individual who is under a summary court, maintained under the Articles of War, where he is put upon a trial of the case and thereupon certain statements were wrested from [20] him; that he was convicted by a summary court first, followed by an F. B. I. man who takes him in, yet he is not under restraint by any process of law. They had usurped the powers of this Court and upon that wresting from the individual of an extrajudicial confession seek upon that confession alone to bring in evidence they claim is sufficient to convict. To admit it in evidence is to convict him upon extrajudicial testimony in its entirety. If they can identify those things and connect this defendant with any testimony, or any evidence competent in any respect, there would be no objection, but counsel does object

to the violation of a rule of law that has been established and maintained for many years, that evidence of that character is not admissible when there is no other foundation laid except an extrajudicial statement.

The Court overruled the objection and the box of tools was admitted as U. S. Exhibit No. 12.

Whereupon the plaintiff rested and the defendant, to maintain his defense introduced and offered the following evidence.

CLINTON B. McELHENY,

defendant, called as a witness in his own behalf, having been first duly and regularly sworn, testified as follows:

My name is Clinton B. McElheny and I reside on Auburn Boulevard, Fair Oaks District and have resided there for five years. I have been a mechanic and supervisor of Air Craft Shops for approximately 16 years. I went to work as a mechanic and welder for the United States Army Air Corps in San Diego, March 1, 1929; came to McClellan Field in 1939 and have been continuously employed by the United States Army Air Corps. I was so employed from 1939 at McClellan Field until November 25, 1943.

The document you have handed me is headed, "Headquarters, Sacramento Air Service Command" dated November 30, 1943, and is the official suspension by order of Captain Mitchell. The other [21]

(Testimony of Clinton B. McElheny.)

one, dated December 8, 1943, is a notification of personnel action. States the date last worked as November 25, 1943, is correct. When I first went to work at McClellan Field, I was employed as a mechanic and welder supervisor. I had a similar position at San Diego. When we came up here from Rockwell Field, this Field was about 20 per cent complete and I was put in charge of several gangs of men putting the place in condition. I had charge of pipe fittings, some electrical work, some rigging, moving of heavy machinery and in general putting the buildings into condition for occupancy. The buildings were behind schedule and we had to do about three-quarters of it. I was acting foreman then. On April 6, 1942, I was appointed group superintendent, maintenance group, as a plant maintenance. On September 1, 1942, I was made general foreman of Air Craft Shops.

Whereupon, document dated April 6, 1942, Notice of Appointment of defendant, Clinton B. McElheny, from general foreman, general mechanic to group superintendent, maintenance group OA, plant maintenance, offered in evidence as defendant's Exhibit "A".

Also document dated September 1, 1942, change in status from general foreman of maintenance to general foreman of Air Craft Shops McClellan Field, as defendant's Exhibit "B".

Also employee's copy dated October 13, 1942, appointment of defendant from General Foreman, Air

(Testimony of Clinton B. McElheny.)

Craft Shops to Assistant Superintendent Air Craft Shops, as defendant's Exhibit "C".

All of which were objected to by counsel for plaintiff on the ground they had no bearing on the guilt or innocence of the defendant which objection was overruled and the Exhibits admitted in evidence.

In my position as foreman and as assistant general superintendent, it was necessary for me to have tools issued to me from the tool room supply department of the field. The memorandum receipt dated 9/27/39, Sacramento Air Depot Supply, Clinton McElheny, con- [22] sisting of three pages, was issued to me September 27, 1939, and is part of some of the tools which I brought with me from San Diego. There were a great many more than this and prior to my coming to the Depot here from the San Diego Depot, some of my tools were shipped to a Captain Austin. There was a welding machine, welding torches, hoses, welding regulators, and some heavy tools.

Whereupon counsel for the Government interrupted to make an objection that this testimony was foreign to the case and did not involve any article they had there and was incompetent, irrelevant and immaterial.

Whereupon the Court inquired, "What is the purpose?"

Counsel for the defendant stated that it was to show that these tools are issued to this man on

(Testimony of Clinton B. McElheny.)

this memorandum and charged to him and is stating the general nature of what was handed to him; that these tools are only a small part of what this man had and was leading up to the point as to how these tools were first issued to him and how and why they found them at his home; that counsel could proceed only in the ordinary way and if it is not germain it may be subject to a Motion to Strike; that the defendant had been a long time in the service from 1929 and as he has stated, he had to bring a great number of tools from San Diego to this Field in 1939.

Whereupon the Court inquired, "Those tools are not in issue here, are they?"

Whereupon, Counsel for defendant stated, there are some tools right here that are charged that the Court allowed to be introduced in evidence.

Counsel for the plaintiff stated he was not talking about the tools taken to the Field; that counsel was talking about the tools the defendant took to his home.

Whereupon, Counsel for the defendant stated that the defendant [23] is going from the Field to his home and from San Diego to his home too, with tools; that he intended to show by this witness that the witness has had in his possession hundreds of thousands of dollars worth of tools of which these are only a small part.

Whereupon, the Court stated, "We are only interested in the tools taken from the Field".

(Testimony of Clinton B. McElheny.)

Whereupon, Counsel for defendant said, I am leading into that now. I can show them on his memorandum as they are charged to him. Then I will show that a lot of this stuff has been paid for; that it has been deducted from his pay. We have the receipts. I am showing that this man is no thief. He has been too long in the service. Just as proud of his position——

Whereupon the Court interjected, “There is no need to argue now. Proceed”.

Whereupon, Counsel for defendant stated he had given Counsel a large number of these particular memorandums and that some of these items you will find right here.

Whereupon Counsel for the plaintiff read off some of the items as follows, with the remarks:

One refers to Blue Ribbon bicycles. There are no bicycles here.

The next one refers to a paper fastening machine. There is nothing like that here.

The third one refers to a precision measurement book. There are no books here.

He has given me one referring to a level, machinery testing. There is no level in this case.

He has given me a lubricator, pressure type. There is no lubricator, pressure type here.

Fan, desk and wall.

“I assume this man was at the Field and had different tools charged to him. I am not talking about the tools he had charged [24] to him and

(Testimony of Clinton B. McElheny.)

issued in his work. I am talking about tools he took from the Field and took to his home which he stated he knew was wrong and against the law to do."

At which point the Court stated, "That is the issue."

Whereupon counsel for the defendant stated that he was endeavoring to show the system in vogue at the field; to show that everything that he got was on a memorandum; that the defendant was charged with these tools and that the individual working at the field had tools issued and charged to him and when he turned some in he gets a credit. Those he hasn't turned in are deducted from his pay.

Whereupon the Court stated the issue was whether the defendant took these particular tools from McClellan Field and defendant's counsel then stated that he brought a lot of the tools in evidence from San Diego.

Whereupon, counsel for the Government stated he was withdrawing the article described in the indictment as 1 pump, Lehman Brothers, size 26, number 15229.

Whereupon, defendant identified one Warding eight inch flat file in evidence as being included in his memorandum dated June 2, 1942, number 4223192 on page 2 thereof and also one flat file, bastard No. 2 cut six inches; also one-half round bastard file, ten inch; also one-half round 8 inch;

(Testimony of Clinton B. McElheny.)

also one flat 10 inch; also one 8 inch; also one 12 inch; also one knife file.

Whereupon the Court inquired, at the suggestion of Counsel for plaintiff, as to the purpose of this examination. Defendant's counsel then stated that these tools were issued to him on the memorandum exhibited, which memorandum was canceled by the field, showing that defendant had bought the tools and paid for them and that if the Government had any action against the defendant, it was a civil suit. Further, that the showing was being made to show the absence of any felonious intent or any act of stealing, as these [25] tools were regularly issued to him by the tool section on these memorandums.

Examination on Voir Dire

By Mr. Seawell.

These tools I have identified are tools set forth on this memorandum. Other tools shown are expendable material. These I have identified I paid for in November. I have had hundreds of articles issued to me out there and can identify these particular items as I had them at home. I did not know I should not have had them at home. I was told by the officer at the Court Martial trial I had committed an offense by taking tools home which were charged to me. I thereafter told Mr. Moehle I shouldn't have them at home and violated a Federal law in so doing. I didn't know that a lot of these weren't charged to me other than that they were expendable items.

(Testimony of Clinton B. McElheny.)

Whereupon Counsel for plaintiff stated he could not see the materiality of this testimony; that the defendant took government property home and converted it to his own use, which is the essence of the charge; that it made no difference that some might have been charged to him and others were not.

Counsel for defendant argued that if the defendant was charged with the tools; he did not take them with felonious intent and that certain items were issued on memorandums and others were issued as expendable material.

The witness then further testified:

My position as general foreman was the last I occupied immediately prior to being transferred to Assistant Superintendent of Air Craft shops. At the time of my transfer I had tools in my possession from both the supply and from the tool rooms for use on the field and not at home. At the time I was made Superintendent, I had thousands of dollars worth of equipment charged to me, some of which I attempted to explain that I brought from San Diego. There are in this box some I brought from San Diego. The torch [26] I have on this 1939 memorandum. I would say there were a thousand articles I had taken over from the man in plant maintenance, who died, which I had turned in and converted to other people who had army jobs and some of that material I still have on my memorandum and some of it I paid for lately. From 1942 until I was removed from my job on the Field I had succeeded in turning in a great

(Testimony of Clinton B. McElheny.)

amount of material and some I had transferred to the men who were using them. I drew thousands of tools, both expendable and charged to me and let at that time other mechanics use them. All of the tools, for instance, in plant maintenance were charged to me. Lathes, electric drills, electric concrete breakers, air concrete breakers. And when I became shop superintendent I had this box of tools plus a great many more which I had no place to put or store and it was more or less for us to find some place to put them so I took these tools and had them put in a box and that is how they came to be in that box. They were in my office. I paid for a lot of material which you will see we have a receipt for which was stolen from my office. This material was given to me for my use on the field and it was stolen from my office, so at that time I decided I had better do something about it, because they came through once in a while and cleaned the place up and I lost a lot of tools like that and paid for them. They were lost on the field by being cleaned up. It was my responsibility and I paid for them if I couldn't prove they were stolen or thrown away in the cleanup. I have memorandum receipts of credits back in June, 1941 and 1942 where I have continually tried to turn this material in and worked with Mr. Parker of the tool room to clean up my memorandums. From the start of the war until I was released by the Government, my average day was around fourteen hours a day.

(Testimony of Clinton B. McElheny.)

The Court then asked, "Well. We are interested in finding out why you took the tools to your house and kept them for such a long time. That is the issue". [27]

Whereupon the witness further testified:

As I say, there was some expendable material. That is, the foreman drew this material which was not charged to anybody and he distributed it out to other employees. So I gathered up this material and had it put in a box and this is the material I had at my home. At the time I put it in the box, I had no place to preserve it, understand. I took them home. There was more than this. They were expendable material which I had not distributed out to the men. I took them home in 1942 and after 1942 and until the F. B. I. came and took them away. I would say they were there a year and a half. In the meantime I had brought back quite a bit of this material. I had them stored in the house not knowing at the time when I would be able to clear up my memorandum. Some of them were actually charged to me. I had been sorting them out and had been making an honest effort from the time I was shop superintendent to clean this material up. I worked fourteen hours a day. Sometimes three shifts a day. I had to stay three shifts and had very little time to go over these tools. Some of these tools I paid for that were lost that are on my memorandum I didn't take home. However this stuff was at home. I have a tape that I carried in my pocket. I see that there. That

(Testimony of Clinton B. McElheny.)

was home two or three days or a week when they came to my place. I carried that tape all the time. Whenever I had a job to do that required the use of the tape I would take the tape home or it would be in my pocket. If I went out on a wreck to estimate the damage to the road or the field and I carried that tape. When I went to Placerville and estimated the damage done to the road there I carried that tape. Other stuff charged to me, wrenches, tools off the place. Have done so repeatedly and didn't think I was committing a crime. I have carried some four or five hundred dollars worth of diamonds. Industrial diamonds in my pocket. I had no place to keep them. I have the receipts there where I signed for them. I [28] brought them from the depot supply and issued them to Engine overhauling Section which they in turn gave me a receipt. But prior to the time I issued them I carried them in my pocket. I have one receipt for three hundred and some dollars of industrial diamonds I carried off the base.

At the time I was made Assistant Superintendent, Air Craft Shops, October 13, 1942, I was then placed in the engineering department under the Supervision of the General Superintendent of Air Craft Shops and supervised the work of eighteen general foremen, Air Craft Shops, thirty-seven Assistant General Foremen, Air Craft Shops and approximately fifty-five hundred Air Craft Shops employees. I had not had time to complete the entire turning in of all of these tools and equipment here

(Testimony of Clinton B. McElheny.)

in evidence before I was suspended from my position.

Some of the tools here in evidence were issued to me but not on my memorandum receipt. In order to get this type of tool under the "17 B class", we fill out a form 81, for the amount we need to supply the men working for us, or as near as we could come to it and they were brought to us from supply and we doled them out as we saw fit to the persons that needed them that used them. Lots of times we drew too much and lots of times we drew too little. Those were not charged to me.

Whereupon defendant's Counsel asked, "Now, when you were attempting to leave or were transferred from one position to another, what means were provided to get them out of your possession?"

To which Counsel for plaintiff objected as incompetent, irrelevant and immaterial, which objection the Court sustained.

There are a lot of tools in this box that were drawn on Form 81. The drills, the files, the smaller reamers, the smaller drills and if you took them to the store room now——

On motion of Counsel for plaintiff the Court struck out the phrase, "If you took them to the store room now". [29]

Sometimes we took some of these tools to the store room or tool room and attempted to get them back into the possession of the Field, which statement was by the Court stricken out on motion of counsel for plaintiff.

(Testimony of Clinton B. McElheny.)

I did take some of them back to the store room and sometimes they would accept some and others they wouldn't, depending on the store keeper. Some of these small items are expendable. Such as those on Form 81 on which you draw files, small drills, wire brushes, small reamers; that is drills up to quarter inch; over that they are accountable and are on your memorandum. You draw on this Form 81 and expend them yourselves as foreman. That is how come I have so many of them of various sizes. I drew these tools. Maybe some of them three or four years ago and they have been in my possession at the field and at home as I said. I have drawn on Form 81 as many as thirty-five or thirty-six or three or four dozen sets of small drills up to quarter inch; India sharpening stones and such equipment which is doled out to the various men I had working for me. When I was foreman of the fuselage department it was common for me to draw at least two dozen of India sharpening stones and those stones were doled out. And files the same; small drills. In this box of tools there are undoubtedly some of those that have been left over, the residue—in the fuselage department, for instance. I had some 150 men. I would not be surprised that at times I had drawn 150 of one of those types of files and doled them out. I know for a fact I have drawn fifty of one type of file we have there and doled them out. And in the course of drawing these tools over say four years or five this is a collection of them in which some of it in

(Testimony of Clinton B. McElheny.)

the last few months or the last year they began to issue tool kits on a standard memorandum receipt, and some of these were included—some of which were included on the memorandum receipt. When I got the last memorandum receipt I believe I had—I don't know whether I [30] have it with me or not—I have a complete list of expendable material charged on my memorandum receipt. It is a new system set up to charge each man with the expendable items. Expendable and nonrecoverable is a phrase used in the Army and are those and consist of those small things stated. I have drawn thousands of dollars worth of expendable and nonrecoverable material and with no intention of theft I took them home. I was cleaning up my memorandum receipts and that is why they remained home for more than a year. I have credits way back in 1942, where I gradually cleaned them up. Every opportunity I had I cleaned up my memorandum receipts. I had some fifteen or twenty of them. After I was removed from my job I had tools turned in to the store room. There are some now on my memorandum receipts that I myself don't know where they are.

The Court observed, referring to the indictment, that there was a whole page of drills, and the witness continued his testimony.

Yes. Quite a few of miscellaneous drills of the old carbon type. At the suggestion of the Court that there were eighty-seven drills, the witness further testified, they were all small drills. Some of

(Testimony of Clinton B. McElheny.)

them I had only a short time and some I had a whole year at home. As I cleaned up my desk, I will say in August, 1943, I found some more material that was actually my responsibility, had no place to put it, I found it in my desk in plant maintenance. I had Mr. Lane put them in a box and bring them to my office. I in turn took them home and stored them. I did not take it with any intention of stealing. I tried to explain to the Court a while ago that I had been working hard, long hours and succeeded finally in cutting down my memorandum to a very few items and some of that is expendable material. I have credit memorandums to show I have been actually cleaning up my memorandums. Some of the expendable material I had at home I brought back. I had three [31] flashlights during the blackout that were issued, nonrecoverable. We have had some thirteen hundred of them and I returned mine to the post the 1st of November when I started cleaning up my stuff. I was just getting to this material. I have always cooperated with our so-called intelligence department while I was superintendent of the shops. I have not succeeded in cleaning up all my memorandums involving the particular tools in evidence. There are other and additional matters I have cleared up. Some of this material here is what is called expendable and nonrecoverable. They are the small drills, files, Indian stones and such. When they are used up they are junked. That particular drill pointed out to me is one of the type that is expendable and non-

(Testimony of Clinton B. McElheny.)

recoverable. The 5 x B Reamer is not. It is on my memorandum and I am required to account for it.

That oxygen gauge is one of several I bought at a junk yard. I had no bill of sale. I turned it over to Mr. Chandler as he suspected it was Government property along with some of my dies and collets which he also took with him. I bought that and some half dozen more of them from Solomon's Junk Yard on Atlantic Boulevard and brought them to Sacramento with me. They were of a type formerly used at the Field but now obsolete and have been since about 1937. All the quarter-28 are my personal die collets (Witness picks out of the collection 7 dies and collets). There is no way of determining from an inspection of those small drills which were issued to me from the Field or given to me or handed out to me as expendable and non-recoverable. There is no way to pick out from those drills those which are mine. Some I have had from sixteen to eighteen years and some from my previous employment in the boat shop, up to 5/16 and 1/2 inch. I cannot identify the difference between them.

Defendant's counsel then offered to examine the witness on a partially mimeographed and partially typewritten letter of the [32] Sacramento Air Service Command, McClellan Field, dated January 4, 1944, which defendant testified he received through the mail and offered to show that it was

(Testimony of Clinton B. McElheny.)

a demand from McClellan Field in the sum of \$61.24 to cover the cost of lost tools.

Counsel for the Government objected on the ground it was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Defendant's Counsel offered in evidence Memorandum receipt issued by the War Department Air Corps, Sacramento Air Depot, Depot Supply, to Clinton McElheny, consisting of three pages dated September 27, 1939, containing tools identified by witness as being in evidence here for the purpose of showing that the tools and equipment were regularly issued to him; that he was charged for them and that they came lawfully into his possession.

Whereupon Counsel for plaintiff objected on the grounds they were incompetent, irrelevant and immaterial, not bearing on the guilt or innocence of the defendant and that no foundation had been laid, which objection was sustained by the Court.

Whereupon Counsel for defendant offered in evidence, Memorandum receipt in the same form to Clinton B. McElheny, No. 42-293, dated January 7, 1942, issued by Sacramento Air Depot, for the same purpose and on the same basis, which was objected to by counsel for the plaintiff on the ground that no proper foundation had been laid and was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant then offered in evidence Memorandum receipt in the same form, issued to

(Testimony of Clinton B. McElheny.)

Clinton B. McElheny, No. 42-3529, dated August 20, 1942, consisting of one page, for the same purpose and upon the same basis, to which counsel for plaintiff objected on the grounds no proper foundation had been laid; that it was incompetent and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained *by* [33]

Counsel for defendant then offered in evidence Memorandum receipt issued to Clinton B. McElheny No. 42-32912, account No. 561, dated June 2, 1942, consisting of four pages, to which Counsel for the Government proposed the same objection and which was sustained by the Court.

Counsel for defendant then offered in evidence Memorandum Receipt No. 42-9620 dated November 12, 1942, Account No. 561, to Clinton B. McElheny *was* was objected to by counsel for plaintiff on the same grounds and which objection was sustained by the Court.

Counsel for defendant then offered in evidence, Memorandum receipt No. 42-32352 dated June 5, 1942, from McClellan Field to Clinton B. McElheny, which was objected to by Counsel for plaintiff on the same grounds, which objection was sustained by the court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-18347, dated May 7, 1943, Account No. 561, from McClellan Field to Clinton B. McElheny, to which counsel for plaintiff objected

(Testimony of Clinton B. McElheny.)

on the same grounds and which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-9620, dated November 12, 1942, Account No. 561, issued by McClellan Field to Clinton B. McElheny consisting of one sheet, which was objected to by Counsel for plaintiff on the ground no foundation was laid and was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 44-15, November 23, 1943, from McClellan Field, to Clinton B. McElheny, which was objected to on the ground, no proper foundation, no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Counsel for defendant offered in evidence, Memorandum receipt No. 44-3909, Account E-M-7753, dated November 29, 1943, McClellan Field to Clinton B. McElheny, which was objected to on the same [34] grounds.

Counsel for defendant then offered in evidence, Memorandum receipt No. 44-68, Account No. E-M-3753 (5a), dated July 1, 1943, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground, no proper foundation was laid, no bearing on the guilt or innocence of the defendant, incompetent, irrelevant and immaterial, which objection was sustained by the Court.

(Testimony of Clinton B. McElheny.)

Counsel for defendant offered in evidence Memorandum receipt No. 43-6431, dated September 26, 1943, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground no proper foundation was laid, was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-6564, dated September 26, 1942, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground no proper foundation laid, no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Counsel for defendant offered in evidence duplicate receipt No. E N-3753, Voucher 1-12-44, issued to defendant for list of tools in the sum of \$52.92, which was objected to by counsel for plaintiff on the ground it was incompetent, irrelevant and immaterial and outside the evidence in the case, which objection was sustained by the Court.

The testimony of defendant in support of the offer was as follows:

I received that receipt from the tool section of McClellan Field when I paid for my lost tools. Before I could get my final check I had to pay for my tools. I do not remember when that was. It would be either December, 1943 or January, 1944.

Whereupon the witness further testified: [35]

I did not at any time take any of the tools intro-

(Testimony of Clinton B. McElheny.)

duced in evidence here and claimed by the United States or McClellan Field with the idea or the intent of converting them to my own use.

I did not at any time ever claim to be the owner of any of them other than those which I had paid for under my memorandum, to which counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

I did not ever claim ownership of any of the tools here at any time up to the present date other than those collets which I picked out as my own private property. I had told these investigators prior to November 23, 1943, that I had taken tools home. I would say it was in the latter part of August or the first part of October, 1943. They had apprehended some person who had taken some material and called me up as Shop Superintendent to see if I would complain against the man or issue some complaint. They asked me what I was going to do.

I told them the only thing I could *so* as Shop Superintendent was to discharge the man, which I would do on their evidence, to which counsel for plaintiff objected and asked that the answer be stricken as having nothing to do with this case whatsoever, which objection was sustained by the Court.

Whereupon defendant continued:

I told them at that time I had tools I had taken home. Present at that time were Mr. Cecchetti, Captain Ark, Mr. Chandler a part of the time and

(Testimony of Clinton B. McElheny.)

Captain Kenny. I told them I had some of my tools at home and told them the circumstances surrounding the reasons why I had taken them home and that I was endeavoring to bring them back and turn them in, which I testified yesterday that I did and have been doing. At that time they did not do anything about it. However, they asked me as I said, to complain against these individuals which I could not do and if it would not be a [36] good idea to make an example of people who had taken material. I told them I didn't know. I wasn't well enough versed in that thing. However, I was doing my best to clean up my memorandums and would continue to do so. I was before the group mentioned in Plaintiff's Exhibit 10, the day before that statement was signed by me. They called me at night, I had worked until about 7 o'clock and asked me if I would come up to see them. I did that and Mr. Chandler then went with me to my place to see what tools I had. They said I should go to my place and return these tools with Mr. Chandler, which I had at home. They kept me there more or less questioning me after that—we got back about 11 o'clock I believe, or 12—until about 2 o'clock in the morning. They said they didn't believe me that this was the extent of the tools I had. That they expected to find a great many more machinery, heavy equipment and indications that I had gotten rid of a lot of machinery and tools. However, I did my best to assure them that I hadn't. They would come in and

(Testimony of Clinton B. McElheny.)

talk to me and they would go out. It was a sort of hodge-podge system of interviewing. One would talk to me and go away and leave me and give me no indication to go home. So I got home that morning about, I would say 2:30 or 3:00 o'clock and I appeared that morning at my work at 7:00 o'clock, the regular starting time. At about a quarter to eight, while at work in my office on test block equipment with the United States Engineer, Mark Falk and his assistants, this man Chandler appeared at my office and I asked him to wait until I had completed this job. I left my office at about 11:00 o'clock with Mr. Chandler and again went out to my place to see if we had missed anything, which he thought was Government equipment in the dark. We had gone there the night before. We found some other equipment that was scattered around. My tools had been moved. The roof blew off the shed or barn referred to and I had my boy move some of that stuff—some of that stuff that was left there [37] in the barn. Then we again returned to the Field some time after 12:00 o'clock. I went to lunch with Mr. Chandler and we came back to the Intelligence Office where this statement was written. Lieutenant Ark again accused me of having various equipment. Said I wasn't telling the truth. I didn't seem to be able to help him because I was telling the truth as I knew it. That went on again for a matter of two or three hours. Then they left me alone for some time. Then they called in a Captain Robert Pierce, who represented himself to be the

(Testimony of Clinton B. McElheny.)

Summary Court Martial Officer, representing the Commanding Officer, who said he wanted to take testimony or something of that sort and read me the Articles of War. I believe it was 80. He was a very nervous person and I didn't get a whole lot out of what he was driving at. He was terribly nervous. Appeared agitated. That would be the 24th day of November. It was the day after I signed Plaintiff's Exhibit 10 and that would make this meeting November 25th. Captain Pierce questioned me as to whether I had a bank account, whether I had taken any equipment, whether I knew certain people, whether I knew their business methods, whether I knew that the Government should not buy from a vendor but from a contractor and said that I bought materials from vendors. I said I did not buy material; that I recommended the purchase of material. I can be specific in this case if you wish.

I denied that I had purchased equipment from vendors because my own responsibility was a recommendation of equipment to be purchased, to which counsel for plaintiff objected as incompetent, irrelevant and immaterial and no bearing on the guilt or innocence of defendant, which objection was sustained by the Court.

Defendant further testified:

Preliminary to taking of any statement by Lieutenant Ark on November 24, 1943, he told me they had evidence that I had taken a lot of equipment from the Field and that they intended to prove [38] it and that I had not been cooperative with them and

(Testimony of Clinton B. McElheny.)

read me the Articles from a book. I am not an attorney. I am a mechanic. I was never arrested or prosecuted for any felony at any time in my life. I was arrested on traffic charges and I think I have one ticket for violation of a Motor Boat Act, fire extinguisher violation. Neither Lieutenant Ark nor anyone else advised me at any period of that proceeding or hearing that I was entitled to counsel and did not mention the fact I should have a lawyer and did not mention the word "lawyer."

I was taken to this meeting by Mr. Chandler. I was in his custody all the time. He practically lived with me during that time.

Which words, "he was in his custody" were objected to by Counsel for plaintiff as calling for a conclusion of law, which words the Court struck out on motion of counsel for plaintiff.

Defendant further testified:

I was with Mr. Chandler all of the time and he never left me far out of his sight. He went to my home with me and came back from my home with me. He went up to the hearing on November 24th with me and went with me before Captain Pierce on the following day, November 25th, and was in the room.

Cross Examination

I recall the 21st day of November, 1943, and do not remember disposing of some United States Government property on that day. I threw some junk down a well. I admitted it to the investigators and listed it for Mr. Mochle. That was not United

(Testimony of Clinton B. McElheny.)

States Government property. I wouldn't say that it came from the Air Field. Some might have come at some time, but I wouldn't be able to identify it as Government's material. I said some of it did come from McClellan Field. I threw some junk down a dug well. I was cleaning up my tools. I was told to clean them up prior to this and was cleaning out my back porch. There were two paint cans, [39] pieces of stove pipe, some old shoes, some old files, some pieces of copper tubing, some bottles, some old pieces of oxygen gauges, parts of oxygen gauges that you saw here yesterday and more or less junk material. It is my practice when I clean up around, that I take that junk down there and throw it down the well. I have been putting stuff in that well since I had the property. Material I had there wasn't returnable. If it was returnable I would have had to pay for it. I couldn't say for sure whether any of it was taken from the Field. There might have been some that came from the Field like the small files, or it may not have been government property. The oxygen gauges I had had for 10 years. Worn parts of oxygen gauges. I made no secret to anybody that I had disposed of that material, as set forth. They didn't find it in the well. I did not say that was United States Government property in the well and did not say it came from McClellan Field. I told Mr. Moehle it may have, some of it. The copper tubing may have. I had some of this government property at my home for a year or longer than a year, a year and a half. I said

(Testimony of Clinton B. McElheny.)

I was cleaning up my memorandums and returned a lot of material over a period of years. I had also cleaned up a lot of some other tools as shown by my credits. I had so much material I was returning that it took me a year and a half to return it and still have this much left. I didn't have a warehouse full at home but I had a warehouse full at the Field. These articles were at my home. This is the last material or practically the last material charged to me that I had access to. From time to time when I got time I got hold of Mr. Parker of the tool room or Mr. Tormeu of the Plant Maintenance who handled some of my Memorandum receipts for me and had them clean up tools for me. I gathered tools up and turned them in at the Field. I have to go through the records and sort them out and see what is expendable; otherwise I would have to pay for them if they are not cleared up. In over a year and a half [40] I didn't have time to return these tools and that statement is partially right. I drove out to the Field every day and sometimes three times a day. I did not have room at McClellan Field to store these tools and so took them home. I had charge of the whole maintenance division covering some 15 or 20 acres. There wasn't room there to store these few tools where they would be safe.

Whereupon Counsel for the plaintiff asked the witness:

"In other words, all the rest of the tools, the bomb sights and whatnot at McClellan Field are not safe,

(Testimony of Clinton B. McElheny.)

so to keep these tools safe you had to take them from McClellan Field to your home and put them in a trailer house and a garage and a barn. Is that your testimony?"

The Witness:

"May I refuse to answer that question?"

The Court:

"Answer the question."

The Witness:

"I can't, sir, because he put the question about bomb sights would not be safe. I cannot answer that."

Whereupon counsel for plaintiff asked the witness:

"With all the tools and the other equipment out at McClellan Field, some millions of dollars worth of equipment, you got so worried about these particular tools that you decided to take them from McClellan Field to your home so they would be safe, is that your testimony?"

To which counsel for defendant objected on the ground it was improper cross examination, assuming facts not in evidence, as defendant had said nothing about being worried about tools, which objection was overruled by the Court.

Defendant further testified:

I took them home because I had no place to keep them except [41] in my office. I lost stuff at my office and had to pay for it. I bought them home for two reasons: So I could segregate them

(Testimony of Clinton B. McElheny.)

and return them and clear my memorandums, which I was doing, and where they would be under my own protection. I was Superintendent of the Maintenance Department and had 15 acres and many buildings thereon under my partial control and there were guards around the premises. I did not testify that I returned some of these tools; that I returned some of these tools and then brought them back to my home again. I said my memorandums were gowed up so that I didn't know what was charged to me. I could not say whether I did or did not try to turn in that particular wrench to the tool room. I did return some as evidenced by my credits. I believe I did try to turn in some of the articles that are in evidence here. I can't recall the particular ones. I can't say that truthfully because I did not take them back to the plant to return them until I found where they were charged to me so I could get credit for them. Otherwise I would have to pay for them.

I understand that expendable doesn't mean I can put a drill in my pocket or take it home and sell it. An expendable item is one you are not accountable for unless it is on your Memorandum receipt.

They don't issue material as expendable to take personally to your own home or to sell to somebody in the street. It is still property of the United States Government to be used only in the work. I called the attention of Mr. Moehle, the F. B. I. Agent, to a mistake in his list of tools and the type

(Testimony of Clinton B. McElheny.)

of torch that I am charged with; that my Memorandum was wrong. At that time I did not know and had not given any thought as to what was in the box and what we did pick up. I told Mr. Chandler at the time we picked up those tools I had no bill of sale for them but maybe some of them were mine. I may have mentioned that to Mr. Moehle the F.B.I. Agent: I am not sure. I had quite a lengthy conversation- [42] tion with him. I signed the statement you have exhibited to me on both pages. I read it. At the time that statement was taken I learned I shouldn't have had the tools in my possession and I was violating a federal law because I was told by Captain Ark that I had violated the law and I was told again by Mr. Moehle.

The other men at the Field were provided with places to lock their tools up. I had no place to keep my tools but in my office. I could not have a place to lock up my tools. I had some tools as late as November the 23rd and 24th in 1943 that were in the stock room in Plant Maintenance which were on my Memorandum receipts, being issued out to men that I was directly responsible for and would have had to pay for had they been lost. They were in the plant maintenance stock room, being issued to them. The four items you are showing me were part of the tools that I had been returning and which I admitted I took from the Field and took them home. I can't identify them as United States Government property. You will find "U. S. A." on all kinds of tools. I wouldn't say whether they were

(Testimony of Clinton B. McElheny.)

Government tools or not. If they came from my home and they had "U. S." on them I would not say they were Government tools. I wouldn't identify those wrenches that have "U. S. A." engraved on them as Government tools. Although I told the government agents they were government tools and I took them to my home. Although I took them from McClellan Field I still say I don't know whether they are Government tools.

Redirect Examination

Defendant testified on Redirect Examination as follows:

I have had Plaintiff's Exhibit No. 6, a steel tape, 50 feet, stamped "Air Corps, U. S. Army" in my possession for about a year. I drew it on an OMAR Ticket. I use that almost daily in my work. I carried it to and from the Field on my person and did not at any time claim to be the owner of it. I used the tape pretty near every day when I had occasion to do any measuring or estimating. [43] I recollect along about the 18th or 19th of November, Mr. Burroughs and myself and the United States Engineer used this tape to measure the test block area where we intended to put the test blocks. I carried it in my pocket instead of turning it back at the end of every day's work and getting it reissued to me the following day, I just continued to use it. It was in my possession at the time Mr. Chandler and the other gentlemen asked me about the tools and at that time I admitted having it in my possession.

(Testimony of Clinton B. McElheny.)

Recross Examination

I had the tape in my overcoat pocket at home the day the Agents went out there.

THOMAS E. DUDLEY

called as a witness for defendant, being duly sworn, testified as follows:

I reside at 2920-Q Street, Sacramento, California, and was employed at McClellan Field until October 23rd. I was assistant to the supervisor of tools and methods. They had what they call similar to a tool and method department, using the minds of all the men at the depot on ideas and ways on how to do things faster and better. My work carried me all over the depot. We designed tools, rebuilt tools, made fixtures, built buildings, tore them down and moved machinery. At that time I had contact with the issuance of tools from the tool room and from the department they call Supply. Tools were issued to me for use in my work.

Q. Were you ever given any permit or anything of that kind to take tools from the Field?

A. Yes.

To which Counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial, which objection was by the Court sustained and then moved that the answer be stricken, which motion was granted by the Court.

(Testimony of Thomas E. Dudley.)

I recognize the document handed me and I have had many of those issued to me. I am the T. E. Dudley named in the paper. [44]

Whereupon counsel for defendant offered in evidence Permit dated July 14, 1943, issued to T. E. Dudley by D. H. Searle, Captain, Air Corps, Engine Repair Officer, Headquarters Sacramento Air Service Command, McClellan Field, California, which was objected to by Counsel for plaintiff on the ground it was incompetent, irrelevant and immaterial.

Whereupon Counsel for defendant stated he was trying to prove the system in vogue at the Field under which tools came lawfully into the possession of Mr McElheny, to show the system that is used at the Field.

The objection of Counsel for plaintiff was thereupon sustained by the Court.

Counsel for defendant then offered the document for identification to be marked Defendant's Exhibit "K", which was as follows:

"Defdt's "K" for Identification.

SASCMD5—5

8 October 1943.

To Whom It May Concern:

i. Mr. T. E. Dudley is to be permitted to carry the following to and from his work at this Depot.

1 Set Drawing Instruments.

1 Machinery Hand Book.

1 Triangle.

1 12" ruler, 1 steel.

(Testimony of Thomas E. Dudley.)

2. He is also permitted to carry partly finished drawings of tools to and from the field. This pass will terminate 1 December 1943.

For: R. G. JAMES,
Captain, Air Corps,
Engine Repair Officer."

Witness further testified that expendable tools are tools that are put on a memorandum receipt. For instance, if we [45] are short of tools or anything is needed, there are a great many items out there that the superintendents, or foreman or leaders can draw and then they are put out on the line or to the mechanics or whatever places they are in and they are not charged to anybody. When they are worn out they are thrown away. Expendable tools covers every phase. Everybody uses them. Army officers use expendable tools. Laboratories use them. Everybody. There are certain classes of expendable tools that cover, I would say, every operation in the whole depot. When they are used that way thereafter there is no one called upon to account for them or to return them.

To which counsel for plaintiff objected on the ground that defendant had testified what expendable is. Which objection was sustained by the Court.

Counsel for defendant then explained to the Court that the defendant had testified that anything over a quarter inch drill on down, comprising 50 or 60 of them in evidence were expendable and as the

(Testimony of Thomas E. Dudley.)

present witness testified they are thrown away so that they are no longer property and the defendant would like to prove that fact by this witness who was a designer of tools and equipment on the Field, which offer the Court denied.

Whereupon, counsel for defendant asked the witness if he knew of his own knowledge whether tools from the Field could be taken home by workmen by authority of the officers in charge of the Field and used at home. To which Counsel for plaintiff objected on the ground it was incompetent, irrelevant, no bearing on the guilt or innocence of the defendant, which objection was by the Court sustained.

Whereupon counsel for defendant asked the witness if he knew whether the tool room at McClellan Field finally posted notices to the effect that tools borrowed for home use were to be returned, to which counsel for plaintiff objected on the ground it was [46] incompetent, irrelevant and immaterial and had no bearing on the case, which objection was by the Court sustained.

Counsel for defendant then asked the witness if he knew whether tools removed from place to place on the field, that is tools charged out to employees, were moved and transferred without the knowledge and consent of the employee. To which the witness answered, "Yes".

Whereupon counsel for plaintiff moved that the answer be stricken and he objected on the ground

(Testimony of Thomas E. Dudley.)

it was incompetent, irrelevant and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Whereupon Counsel for defendant asked the witness if he knew whether tools and equipment on the field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them, to which counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Whereupon Counsel for defendant asked the witness if he knew of his own knowledge whether any employee prior to August, 1943, could obtain a pass from the authorities to take any of that material or tools from the junk pile or fire pit, and take it off the field, which was objected to by counsel for plaintiff as incompetent, irrelevant and immaterial, had no bearing on the guilt or innocence or the defendant and that all such questions were obviously out of order, which objection was by the Court sustained.

Whereupon Counsel for defendant stated he wished to prove by this witness, the system that the defendant had to operate under and to explain why these tools came into his possession as corroborative of defendant's testimony that as a matter of fact he had to take the things off the field

(Testimony of Thomas E. Dudley.)

because he could not clear up [47] his memorandums and get them back into the field.

Whereupon the Court stated, "The Court has ruled".

Whereupon Counsel for defendant made the following statements and the Court made the following ruling:

"May I be permitted to prove by this witness that this—particularly these drills and the reamers and so forth—that smaller tools are issued and charged to a foreman; if they are broken by a workman that the workman—one workman can turn in the bit and another turn in the shank and they get two drills. The foreman is charged with one drill. Well, when he tries to clean up and get his equipment cleaned up he can't turn back but one, and he has normally on his hands—and he has to go through an immense amount of red tape to get the tools out of his possession, and that in case of being shifted from one position to another that he could not do other than what he did, pick them up and take them home until such time as he could unravel his memorandum receipts and get them back into the possession of the Government. The system itself, that is what I am going to have this witness testify to, and he is the best man to do it because he is not only in and around the tool room but he is all over the field, he has designed tools, sees that they are made, and so forth.

The Court: The Court has ruled.

(Testimony of Thomas E. Dudley.)

Mr. Gilmore: May I be permitted to prove by this witness that when there is a change of any type of tools or equipment at the field then the former tools and equipment are condemned by those in command and they are ordered thrown on the junk pile, sold to dealers in Sacramento and elsewhere or ordered burned up and thrown in the fire pit.

The Court: The Court has ruled already, Mr. Gilmore."

Rebuttal

ARTHUR CHANDLER,

witness for plaintiff, recalled in rebuttal, [48] testified as follows:

I had a conversation with the defendant in regard to what he threw down the well, at the Intelligence Office at McClellan Field at which were present Andrew Cecchetti, Captain Ark and myself. He said he had thrown Government property, government tools and equipment down the well.

Cross Examination

He just mentioned he boxed up a box of tools and threw them down the well and then took him over to the well and I had a powerful flashlight and I could see some of those tools down there, oxygen regulators and files. Mr. McElheny told me and he stated to the intelligence officer that he be-

(Testimony of Arthur Chandler.)

came frantic and scared. That was the reason for throwing Government property down the well. The well is in such a condition it is impossible for a human being to go down there because of gas condition, it is an old dug well and can cave in at any time. We didn't feel safe to send anybody in there. It is not cased in and is in loose dirt, and with that well over eighty feet deep we weren't sending anyone down there to get the government property. It's a long way down there to determine the exact nature, but you could see they were parts of oxygen regulators and Mr. McElheny told me they were oxygen regulators. I would say they were the same size as that you have exhibited to me, because I could see very plainly the size. I cannot say whether they were in use at McClellan Field at that time or not. He made the statement at several different times, both out at the well and at the Intelligence Office. I heard the statement on the 23rd day of November and I heard the same statement on the 24th day of November.

Whereupon both plaintiff and defendant rested their respective cases.

The foregoing was all the evidence offered, heard or admitted by either side in this case. [49]

Whereupon the Court orally announced in open Court that:

"I find the defendant guilty on the First Count of the Indictment and not guilty as to the Second, Third, Fourth, Fifth and Sixth Counts."

Whereupon Counsel for defendant moved for a dismissal of the Second, Third, Fourth, Fifth and Sixth Counts of the Indictment, which motion was then and there granted by the Court, and said Second, Third, Fourth, Fifth and Sixth Counts were dismissed.

Whereupon counsel for defendant immediately filed written Motion for a New Trial as follows, to-wit:

[Title of Court and Cause.]

Comes now the defendant, Clinton B. McElheny, and files this as and for his Motion to the Court to grant him a new trial in the above entitled action under the indictment heretofore presented to this Court by the Grand Jury and upon the following grounds of error occurring during the trial of said cause and objected or excepted to by the defendant.

That the grounds upon which this Motion is based are as follows:

I.

Error in law in denying defendant the right to prove that the tools described in said indictment came lawfully into his possession under the rules and regulations of the military authorities of McClellan Field who have exclusive jurisdiction over all persons employed on said Field and whose rules and regulations are supreme thereon.

II.

Error in law in denying defendant the right to prove that under said rules and regulations, the McClelland Field Command does actually issue and deliver to civilian employees tools and equipment on (a) memorandum receipts; (b) omar tickets and (c) as expendable items without receipts or tickets; and that such methods [50] so provided are the only means under which workmen and employees generally and this defendant could obtain tools and equipment with which to work.

III.

Error in law in denying defendant the right to prove that employees of McClellan Field were lawfully permitted under the rules and regulations of the army command at said Field to take from the Field to their respective homes, tools of the Field for private use.

IV.

Error in law in denying defendant the right to prove that employees of McClellan Field were lawfully allowed and permitted to take tools and equipment from said Field under a pass.

V.

Error in law in admitting alleged confessions of the defendant obtained under duress and while defendant was held in technical custody without warrant.

VI.

Error in law in refusing to consider or recognize the Articles of War and in particular Article II and Section 80 thereof.

VII.

Error in law in presuming from the mere fact of possession that each article named in the indictment was a matter of law stolen by this defendant.

VIII.

Error in law in allowing and permitting introduction of evidence in the first instance without identification and with no support other than alleged confessions of defendant.

IX.

Error in law in admitting evidence not identified as having been taken from McClellan Field and founded upon similarity alone.

This motion is made and based upon all the files, papers and [51] records on file in said action and upon all evidence and testimony introduced at the trial.

Dated: February 18, 1944.

CHAS. L. GILMORE,

Attorney for Defendant.

Whereupon the Court denied Motion for a New Trial.

Thereupon the Court immediately pronounced sentence upon defendant as follows, to-wit:

That the defendant, Clinton B. McElheny be imprisoned in the County Jail for the period of one year.

Whereupon defendant gave oral Notice of Appeal with the oral statement that written Notice of Appeal would be filed within five days.

Whereupon the defendant moved for admission to bail pending appeal, which motion was by the Court immediately denied.

Thereafter on the 8th day of March, 1944, and within the time allowed by the Rules of Criminal Procedure, the appellant, defendant below, duly tendered this his Bill of Exceptions herein, which having been seen and examined by the Court and Counsel for plaintiff, is by the Court allowed and approved by the Honorable Martin I. Welsh, the Judge of the United States District Court for the Northern District of California, Northern Division and the same is ordered by said Court to be filed as and for the Bill of Exceptions and made a part of the record herein, which is now accordingly done.

Given under the hand of the Judge of said Court before whom said proceedings were had this 17th day of March, 1944.

MARTIN I. WELSH,

Judge of the United States District Court for the Northern District of California, Northern Division. [52]

The above and foregoing Bill of Exceptions is hereby approved this . . . day of March, 1944.

FRANK J. HENNESSY,

United States Attorney,

By

Assistant United States At-
torney.

CHAS. L. GILMORE,

Attorney for Defendant.

[Endorsed]: Filed March 17, 1944. [53]

[Title of District Court and Cause.]

ORDER DIRECTING THAT PHYSICAL EX-
HIBITS BE TRANSMITTED TO APPEL-
LATE COURT

It appearing to the Court that the original physical exhibits admitted or offered in evidence in the above cause, should be inspected by the United States Circuit Court of Appeals, for the Ninth Circuit, as part of the record of the above named defendant on appeal in said cause;

It Is Ordered that the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the original physical exhibits offered or received in evidence during the trial of the above entitled action.

Dated: March 17, 1944.

MARTIN I. WELSH,
Judge.

[Endorsed]: Filed March 17, 1944.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 88 pages, numbered from 1 to 88, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. Clinton B. McElheny, No. 8637, Cr., as the same now remain on file and of record in this office.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Eighteen and 55/100 (\$18.55) Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 22nd day of March, A. D. 1944.

[Seal] C. W. CALBREATH,
Clerk.

By F. M. LAMPERT
Deputy Clerk.

[Endorsed]: No. 10690. United States Circuit Court of Appeals for the Ninth Circuit. Clinton B. McElheny, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed March 23, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10690

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

CLINTON B. McELHENY,
Defendant and Appellant.

STATEMENT OF POINTS ON APPEAL
AND DESIGNATION OF RECORD

Notice is hereby given that Clinton B. McElheny, appellant in the above action, intends to rely on the Assignments of Error appearing in the transcript of record in the above cause, as his Points

on Appeal and hereby adopts such Assignments as such Points on Appeal, and that the entire transcript as certified by the Clerk of the District Court be printed as the record on appeal in said cause.

Dated: March 24, 1944.

CHAS. L. GILMORE,

Attorney for Defendant and
Appellant.

Due service by copy of the within Statement and Designation admitted this 24 day of March, 1944.

EMMET J. SEAWELL,

Asst. U. S. Attorney,
Attorney for Plaintiff and
Appellee.

[Endorsed]: Filed Mar. 25, 1944. Paul P.
O'Brien, Clerk.